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No.

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1985

TOWN OF SAUGUS AND FRED FORNI,
PETITIONERS,

v.

JAMES T. VOUTOUR,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition.

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84 pp

Questions Presented for Review.

I. May a municipality and its supervisory officials be held liable under § 1983 for alleged deficiencies in the training provided to the municipality's police in the absence of any policy or custom on the part of the municipality, or any act on the part of its supervisory officials, which is itself unconstitutional?

II. Can alleged deficiencies in the training of a municipality's police officers render a municipality and its Chief of Police liable under § 1983 for injuries received by a plaintiff through the alleged use of excessive force by a police officer in shooting the plaintiff, where the municipality and its Chief of Police promulgated and strictly enforced a written policy governing the use of firearms by police officers which fully complied with constitutional requirements, and where the Court of Appeals has affirmed the finding of the District Court that "[p]laintiff has adduced no evidence to show a pattern of violent police behavior which might support an inference that the Chief of Police supported or acquiesced in such behavior" and has affirmed the summary judgment entered by the District Court in favor of the municipality and its Chief of Police upon the plaintiff's claim that they "established a policy or custom of using excessive force?"

III. Can an omission in the training of a police officer constitute the "moving force," rendering a municipality and its Chief of Police liable under § 1983, of a constitutional violation allegedly committed through the use of excessive force by that police officer in shooting the plaintiff, where the municipality and its Chief of Police promulgated and strictly enforced a written policy governing the use of firearms by police officers which fully complied with constitutional requirements, and where the Court of Appeals has affirmed the finding by the District Court that "[p]laintiff has adduced no evidence to show a pattern of violent police behavior which might suport an

inference that the Chief of Police supported or acquiesced in such behavior," and has affirmed the summary judgment entered by the District Court in favor of the municipality and its Chief of Police on plaintiff's claim that they "established a policy or custom of using excesive force?"

IV. Does the Court of Appeal's ruling that a triable issue exists concerning whether an alleged failure by a municipality and its Chief of Police to train a police officer was the "proximate cause" of that officer's use of excessive force comport with *Monell's* requirement that a municipal policy or custom be the "*moving force*" of a constitutional violation?

V. Can an isolated omission in the training of a single police officer form the predicate for an inference of an affirmative municipal *policy* or *custom* of providing grossly inadequate training to the municipality's police force?

VI. Is the Chief of Police of a municipality entitled to qualified immunity under § 1983 for his discretionary acts with respect to the training of a police officer where those acts neither in themselves violated any constitutional rights of the plaintiff of which the Chief of Police should have known, nor authorized or condoned constitutional violations by that police officer, but merely rendered, in the view of the Court of Appeals, such constitutional violations by others "likely to arise?"

Parties to the Proceeding

TOWN OF SAUGUS, Defendant-Appellee, Petitioner.
FRED FORNI, Defendant-Appellee, Petitioner.
HOWARD WHEELER, Defendant-Appellee, Respondent.
HAROLD VITALE, by his administrator or administratrix, Defendant, Respondent.
JAMES T. VOUTOUR, Plaintiff-Appellant, Respondent.

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Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, as amended, is published, with one material inaccuracy[1] as *Voutour* v. *Vitale*, 761 F.2d 812 (1st Cir. 1985). The original opinion of the Court of Appeals, and its memorandum and order upon Petitioners' petition for rehearing, are reprinted as issued by the Court of Appeals in the Appendix to this Petition.

The order of the United States District Court of the District of Massachusetts granting summary judgment to Petitioners has not been published. That Order is reprinted in the Appendix to this Petition.

Jurisdictional Statement.

The judgment of the Court of Appeals was dated and entered on March 29, 1985. Following Petitioners' petition for rehearing en banc, filed April 12, 1985, the Court of Appeals issued memorandum and order denying rehearing on May 8, 1985. The full panel for the Court of Appeals issued an order on May 9, 1985 denying rehearing en banc.

This Court is believed to have jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

42 U.S.C. § 1983
(Text published in Appendix at page 47a.)

MASSACHUSETTS GENERAL LAWS, Chapter 41, § 96B.
(Text published in Appendix at page 47a.)

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[1] The first full paragraph of page 822 of the published opinion was to have been deleted and replaced, in accordance with the memorandum and order of the Court of Appeals upon Petitioners' petition for rehearing, by the paragraph which now immediately precedes it in the published text. The paragraph deleted by the Court incorrectly appears, however, in the opinion as published

Statement of the Case.

A. *Prior Proceedings.*

This action arises from an incident in the early morning hours of February 14, 1977, when plaintiff James T. Voutour ("Voutour") was shot by Saugus Police Officer Harold Vitale ("Vitale") as Vitale's partner was being dragged along a street by an automobile operated by Voutour.

The complaint alleged that Voutour was shot without justification by Vitale, and that Vitale's partner, Officer Howard Wheeler ("Wheeler"), had encouraged and approved Vitale's alleged misuse of his firearm and had failed to prevent Vitale's actions. The complaint further alleged that the Town of Saugus ("Saugus") and its Police Chief, Fred Forni ("Forni"), had adopted an official policy of condoning acts of unlawful violence by Saugus police officers, and that they had acted in a reckless or grossly negligent manner with regard to the training of Saugus police officers. Voutour alleged that the actions of Vitale, Wheeler, Saugus and Forni violated his constitutional rights and 42 U.S.C. § 1983, and constituted an assault and battery and negligence under Massachusetts law. Jurisdiction over the federal claims was predicated upon 28 U.S.C. §§ 1331 and 1343; pendent jurisdiction was invoked with respect to the state law claims.

In April, 1982, at the close of more than two and one-half years of extensive discovery, defendants moved for summary judgment. In support of their motions, Saugus and Forni filed memoranda of law, affidavits and authenticated documents regarding the selection, training, and discipline of Saugus police officers.

In a memorandum of decision entered November 7, 1982, the District Court granted summary judgment to Saugus and Forni, finding that even with all inferences drawn in favor of Voutour, the record did not establish that Saugus or Forni had deprived Voutour of any rights, or that they had been grossly negligent in training police officers. The court also found no evidence in the record of a pattern of violent police behavior which might support an inference that Saugus or Forni supported or acquiesced in such behavior. The court noted that "[t]he only act of defendants Forni or Saugus which might possibly amount to gross negligence" was their failure to send

Vitale to a police training school within nine months of his appointment as then required by Massachusetts statute, but found that "summary judgment for [Saugus and Forni] is still warranted because the affidavits in no way support the inference that such negligence was the 'moving force' behind or even a proximate cause of plaintiff's injury." The District Court also granted Wheeler's motion, finding as a matter of law that Wheeler, who had taken no direct part in the shooting, had not acted in a grossly negligent matter. Vitale's motion was denied by the District Court.

In December 1983, Voutour's claims against Vitale were tried to a jury. In response to a special interrogatory, the jury found that in shooting Voutour, Vitale had *not* violated Voutour's constitutional rights, and returned a verdict for Vitale on Count I, the § 1983 claim. The jury returned a verdict for Voutour on Count II, the state law claim for assault and battery, in the amount of $1,100,000. Both Voutour and Vitale appealed on the grounds that the District Court had failed to disclose to trial counsel written questions from the jury, and the judge's written responses thereto, until after the verdict. Voutour also appealed the District Court's grant of summary judgment to Saugus, Forni, and Wheeler.

In an opinion dated March 29, 1985, the Court of Appeals vacated the judgments entered by the District Court upon the jury's split verdict, holding that the trial judge's undisclosed communications with the jury required a new trial on all counts. The Court of Appeals affirmed the District Court's grant of summary judgment to Wheeler on the grounds that Wheeler was entitled to qualified immunity for his actions.

With respect to Saugus and Forni, the Court of Appeals expressly agreed with the District Court's finding that "[p]laintiff has adduced no evidence to show a pattern of violent police behavior which might support an inference that the Chief of Police supported or acquiesced in such behavior," 761 F.2d at 820, and affirmed the summary judgment in favor of Saugus and Forni entered by the District Court on Voutour's claim that Saugus and Forni "had established a policy or custom of using excessive force." 761 F.2d at 826. The Court of Appeals reversed the District Court's grant of summary judgment in favor of Saugus and Forni on Voutour's claims alleging inadequate police training, concluding that on the record

before the District Court there exists a triable issue of fact as to the effectiveness of the in-service training provided by Saugus to its police force. 761 F.2d at 821. In particular, the Court of Appeals held that a triable issue exists concerning whether Forni had been "grossly negligent to the point of conscious indifference" with respect to police training, and in particular Vitale's training, 761 F.2d at 822, and whether such negligence was the "proximate cause" of Vitale's alleged use of excessive force against Voutour. *Id.* at 821.

Saugus and Forni petitioned the Court of Appeals for rehearing *en banc* on April 12, 1985, and brought to the Court's attention misstatements of fact contained in the Court's opinion.[2] In a memorandum and order entered May 8, 1985, the Court of Appeals substantially revised its statement of facts concerning the factual record before the District Court to correct errors pointed out by Saugus and Forni, but did not modify its judgment, and denied rehearing. On May 9, 1985, the full Court of Appeals denied rehearing *en banc*.

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[2] Among other errors, the Court's original opinion stated that Forni had violated state law by failing to provide Vitale, and possibly Wheeler, with "any police training whatsoever". Slip opinion at 19a. The Court's statement inexplicably overlooked the undisputed record before the District Court documenting substantial in-service training provided by Saugus and Forni to both Vitale and Wheeler, and was withdrawn from the Court's amended opinion. Similarly, in a paragraph which, in a publisher's error, appears even in the published opinion of the Court, *see ante* at 1 n.1, the Court asserted that "neither Vitale nor Wheeler received any training in the use of firearms." Slip opinion at 20a. The Court apparently referred to Forni's interrogatory answer that he had not *personally* given such instruction to his officers (A.107), without noting that the interrogatory answers of the Town made it clear that, as Chief of Police, Forni had no responsibility to provide such instruction in person (A.197). Again, however, the Court's statement inexplicably disregarded the undisputed record showing that Vitale and Wheeler, like other Saugus officers, had received substantial in-service firearms training from other supervisory officers. As Petitioners discuss *infra*, the record before the District Court in fact reveals only one isolated omission in the training of a single police officer: the failure of Forni to send Vitale to a police training school within the statutory period.

While the Court of Appeals amended its opinion to correct certain of the errors in response to Petitioners' request for rehearing, the Court declined to correct other misstatements in its original opinion. Where material to the issues presented in this Petition, those misstatements are noted *infra*.

B. *Statement of Facts.*

1. The Shooting Incident.

In the early morning of February 14, 1977, Saugus police officers Vitale and Wheeler observed Voutour's car parked on a side street with its motor running (A. 440, 519).[3] Vitale and Wheeler had previously seen the Voutour vehicle, which was unregistered and in a defective condition (A. 462-464, 495-498, 559-560), drive the wrong way on a highway access ramp (A. 80, 85); Voutour had been trying to evade the police since that incident (A. 466-467, 512, 515-518). Officer Wheeler approached the passenger door of the Voutour car to investigate. Although Vitale and Wheeler did not use the police cruiser's flashing blue lights or siren, McDonald, Voutour's friend and front-seat passenger, immediately recognized Wheeler as a police officer by his uniform (A. 455), and said something to Voutour (A. 429).

As Wheeler reached for the door handle, Voutour abruptly accelerated his vehicle, which skidded slightly to the right, grazing Wheeler. Wheeler began to fall beneath the car and grabbed the door handle to catch his balance (A. 82, 429-433, 484-488); he struck the car window with the flashlight in his left hand to attract the attention of the driver (A. 439, 485, 486).[4] Voutour's passengers each yelled to him, "It's the police, stop!" (A. 521.)

Wheeler, hanging onto the door handle, was dragged for some distance, while the engine of the car was revving at high throttle and tires spun on the icy street (A. 82, 85, 445-446, 523).[5] Observing his partner being dragged by Voutour's moving vehicle and believing his partner's life in danger, Vitale made a split-second decision that he had to stop Voutour's vehicle (A. 85-86, 445-447, 490-491). Vitale drew his service revolver and aimed at the shoulder of the driver of the Voutour car (A. 86, 491); Vitale's shot struck Voutour in the neck, rendering him a quadraplegic.

2. Training of Saugus Police Officers.

The factual record before the District Court with respect to the training and supervision of Saugus police officers included affidavits,

[3] Statements by Petitioners regarding the factual record before the District Court are cited, for the convenience of the Court, to the appendix to the parties' briefs before the Court of Appeals, which Petitioners have requested be certified and transmitted to this Court.

[4] There is a dispute of fact concerning whether Wheeler was also carrying his service revolver.

[5] Voutour asserts that he was applying his brakes and was stopping his car when he was shot.

interrogatory answers, deposition transcripts, and other authenticated documents submitted by Saugus and Forni in support of their motions for summary judgment, and certain materials submitted by Voutour in opposition to those motions.[6] The record before the District Court established the following facts as to training.

Prior to Voutour's shooting in 1977, Saugus provided extensive training to its police officers in several ways. Saugus conducted a comprehensive program of in-service training, including substantial firearms training, for both new and veteran police officers (A.90). In-service training sessions for Saugus police officers were conducted at roll call. During the period of time Forni was Chief of Police, there were approximately two (2) one-hour sessions during each month dealing with, among other issues, such firearms-related subjects as: (a) Firearms Safety; (b) Firearm Care and Maintenance; (c) Danger in Firing Warning Shots; (d) Safety on the Firing Line; and (e) Approaching the Arrested (A. 90-91, 106, 196). The in-service training provided by Saugus and Forni specifically addressed the situations in which use of firearms was proper or improper (A. 184-185, 708, 709-710).

In addition, in 1976 and 1977, Saugus officers were given 250 to 300 rounds of ammunition annually for individual firearm practice at the police department's firearm range, located in the basement of the police station. These training classes, which included target practice sessions, were supervised by superior officers who examined each officer's firearms training (A. 91, 106, 196).

Apart from the formalized training recited above, each new Saugus officer received considerable informal training by being paired on duty with senior, more experienced, members of the Saugus police force. During the course of their duty, the veteran officer would instruct the new officer on the various procedures relevant to particular situations police officers routinely encounter (A. 90).

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[6] Apart from a selection of unauthenticated documents and deposition transcript pages, Voutour submitted an alleged "affidavit" in the form of a highly-conclusory 104-page report by a purported expert, James J. Fyfe. Saugus and Forni, joined by defendants Wheeler and Vitale, moved to strike the Fyfe "affidavit" as defective under Fed. R. Civ. P. 56(e). The District Court did not rule upon the admissibility of the Fyfe "affidavit," finding summary judgment in favor of Saugus, Forni, and Wheeler was warranted even upon consideration of that document. The Court of Appeals, similarly, expressly declined to rule upon the admissibility of the Fyfe affidavit, 761 F.2d at 822, but inexplicably relied upon Fyfe's improper conclusions in reaching its decision. *See* 761 F.2d at 821-22.

the use of firearms, including the situations when firearms use was proper or improper (A. 183-185, 709-710).

In May, 1975, a senior commanding officer in the Saugus Police Department explained to Vitale the Department's written policy regarding the use of firearms by police officers, and provided Vitale with a copy of the policy, which Vitale read (A. 709-710).

Although Massachusetts General Laws, c. 41, § 96B required regular police officers to attend a police training academy within nine months of their appointment, Vitale had not attended a police academy at the time of the Voutour shooting, nineteen months after his appointment as a regular officer.[9] At the time Vitale became a permanent officer in 1975, he was attending a criminal justice program at North Shore Community College, and Chief Forni believed that Vitale did not wish to have his studies interrupted (A. 169-170). In addition, Chief Forni had found that there were limited places available for police officers in the then-existing police training academies (A. 93). In view of the fact that Vitale had acquired substantial firearms and other police training prior to 1975, Forni decided that other, less experienced, Saugus officers should be sent to the police academy ahead of Officer Vitale, and that Vitale's attendance could be postponed (A. 93).

Prior to the February 14, 1977 Voutour incident, Harold Vitale had never been subject to police discipline for misuse of firearms or excessive use of force; no complaints had ever been received by the police department alleging that Officer Vitale had misused his firearm (A. 93-95, 112). Neither were there any events reported to Saugus or Forni indicating that Vitale had ever used undue force performing his duties as a Revere police officer (A. 93).

During Vitale's four years of service on the Saugus Police Department prior to the Voutour incident, Vitale was the subject of only one informal complaint, alleging that he had unnecessarily restrained a patron in a crowded restaurant. Following investigation, Forni concluded that Vitale had not acted improperly in connection with this incident (A. 94, 161-162, 563-565).

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[9] The opinion of the Court of Appeals inexplicably inflates the period between Vitale's appointment as a regular officer and the Voutour incident into "almost five years." 761 F.2d at 831. Although the dates of Vitale's appointment (1975) and the Voutour shooting (1977) are undisputed, the Court of Appeals declined to correct its error upon Petitioner's request for rehearing.

Prior to the date of the Voutour shooting, Vitale had never fired his pistol at a human being (A. 182).

Argument.

I. Introduction.

In *Monell* v. *Department of Social Services*, 436 U.S. 658, 695 (1978), this Court expressly reserved further development of the full contours of municipal liability under 42 U.S.C. § 1983 "to another day." This case, raising in stark relief fundamental issues concerning the nature of the conduct for which a municipality and its supervisory officials may be held liable under § 1983, signifies that the day which this Court anticipated in *Monell* has arrived, and that further direction of this Court is urgently needed.

The decision of the Court of Appeals in this case, remanding the Town of Saugus and its Chief of Police for trial on issues regarding the adequacy of police training in the face of an explicit finding by the District Court, affirmed by the Court of Appeals, that Saugus and Forni neither established nor acquiesced in an unconstitutional policy or custom of the use of excessive force by Saugus police officers, improperly establishes § 1983 as a "font of tort law," *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), under which a municipality and its supervisory officials may be liable under federal law for "gross negligence" in the conduct of municipal activities which "proximately causes" a constitutional violation neither intended nor even contemplated by the municipality or its officials As Petitioners argue *infra*, the decision of the Court of Appeals contravenes fundamental principles governing proof of municipal policy, causation, and qualified immunity under § 1983 established by this Court's decisions, and conflicts with the consensus among the other federal courts of appeals. Moreoever, the decision of the Court of Appeals in this case squarely raises a fundamental issue which has not yet been, but clearly ought to be, resolved by this Court: whether a municipality and its supervisory officials can be held liable under § 1983 for alleged deficiencies in police training in the absence of any policy or custom, or any action by the municipality's supervisory officials, which is itself unconstitutional.

For these reasons, Petitioners submit that direction by this Court as to the essential contours of municipal and supervisory liability under § 1983 is urgently needed in this case. Petitioners further suggest that the factual and legal context of this case make it an especially appropriate vehicle for this Court to resolve the uncertainty and confusion which currently exists in the lower federal courts concerning these issues.

II. The Decision of the Court of Appeals in This Case Dramatically Expands Municipal and Supervisory Liability Under § 1983, in Contravention of This Court's Decisions, and in Sharp Conflict With the Consensus Among Other Federal Courts of Appeals.

A. *This Case Presents a Fundamental Issue Which Has Not Been, but Should be Resolved by This Court: Whether a Municipality and Its Supervisory Officials May be Liable Under § 1983 for Alleged Deficiencies in Police Training Notwithstanding the Absence of Any Policy or Custom on the Part of the Municipality or Any Action on the Part of Its Supervisory Officials Which Is Itself Unconstitutional.*

The judgment of the Court of Appeals in this case remands the Petitioners for trial upon the plaintiff's allegations of inadequate police training notwithstanding its express agreement with the finding of the District Court that "[p]laintiff has adduced no evidence to show a pattern of violent police behavior which might support an inference that the Chief of Police supported or acquiesced in such behavior," 761 F.2d at 820, and notwithstanding affirmance by the Court of Appeals of summary judgment in favor of Saugus and Forni upon the plaintiff's claim that they had "established a policy or custom of using excessive force." *Id.* at 825. Indeed, the undisputed factual record before the court demonstrates that, far from maintaining an unconstitutional policy with respect to the use of force by Saugus police officers, Saugus and Forni promulgated and strictly enforced a written firearms policy which, in carefully restricting the use of deadly force to life-threatening situations, complies in every respect with constitutional requirements. *See Tennessee* v. *Garner*, 471 U.S. ___, 105 S.Ct. 1694 (1985).

The judgment entered by the Court of Appeals is thus necessarily predicated upon a tacit holding that a municipality and its supervisory officials may be liable under § 1983 for alleged deficiencies in police training notwithstanding the absence of any policy or custom on the part of the municipality, or any action on the part of its supervisory officials, which is itself unconstitutional.

In defining the general outlines of municipal and supervisory liability under § 1983, this Court has never explicitly determined whether governmental liability under § 1983 may be predicated upon a municipal policy, such as that alleged in this case with respect to police training, which is not in itself unconstitutional, but which is merely alleged to be causally linked to a constitutional violation committed by a municipal employee. This Court noted, but did not resolve that issue in its recent decision in *Oklahoma City* v. *Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2436 n.7 (1985). Nor, in a closely-related issue, has this Court established whether governmental liability under § 1983 may be premised upon a *failure* to act by a municipality or supervisory official. Nevertheless, this Court's decisions strongly suggest that municipal liability under § 1983 must be premised upon a municipal policy, and that supervisory liability under § 1983 must be based upon supervisory action, *which actively directs or approves unconstitutional action by municipal employees, and which can therefore itself be found to be unconstitutional.*

In *Monell*, this Court had no occasion to address such issues, because the official policy challenged in that case, a city policy compelling pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons, uncontrovertedly constituted the "moving force" of the plaintiffs' alleged constitutional injuries. 436 U.S. at 694-695. Nevertheless, the language of the *Monell* decision strongly suggests that this Court contemplated that municipal liability under § 1983 would be predicated upon governmental policy or custom which, by directing unconstitutional action, is itself unconstitutional. Municipalities may be sued directly under § 1983, the *Monell* Court declared, where

> the action that is alleged to be unconstitutional *implements or executes* a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, [or is] *visited pursuant* to governmental custom. . . .

> [I]t is when *execution* of a government's policy or custom . . . *inflicts* the injury that the government as an entity is responsible under § 1983.

436 U.S. at 690-694 (emphasis added).

This Court placed similar emphasis upon direct authorization of unconstitutional conduct in the context of supervisorial liability under § 1983 in *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Reversing the district court's issuance of an injunction against city officials predicated upon a statistical pattern of police violations, the *Rizzo* Court pointed to the absence of an "*affirmative link* between the occurrence of the various incidents of police misconduct and the *adoption of any plan or policy by petitioners — express or otherwise — showing their authorization or approval of such misconduct.*" *Id.* at 371 (emphasis added). The *Rizzo* Court flatly rejected, as inconsistent with the language of § 1983, the theory of the plaintiffs in that case that the *failure* of city officials to act in the fact of such a pattern of misconduct was equivalent to active conduct *directing* such misconduct. *Id.* at 375-376.

Emphasizing anew *Monell's* requirement that official policy or custom be "the moving force" of a constitutional violation in order to establish municipal liability under § 1983, this Court in *Polk County* v. *Dodson*, 454 U.S. 312 (1981) clearly suggested that such municipal policy or custom must itself be unconstitutional. Noting that the policy challenged in *Polk County*, withdrawal by public defenders from frivolous cases, "would not violate the Constitution," this court concluded that the plaintiff had failed to allege that his deprivation "was caused by any *constitutionally forbidden* rule or procedure." *Id.* at 326 (emphasis added). Significantly, the *Polk County* Court cited *Rizzo* for the proposition that a "general allegation of negligence fails to state a constitutional claim cognizable under § 1983." *Id.*

Consistent with the mandate of this Court's decisions in *Monell*, *Rizzo*, and *Polk County*, the lower federal courts have broadly recognized allegations of inadequate training and supervision not as establishing in themselves a cause of action under § 1983, but as evidence which could support an inference of a tacit, unconstitutional municipal or supervisory policy or custom authorizing, approving, or acquiescing in misconduct by the municipality's personnel. *See* e.g., *Turpin* v. *Mailet*, 619 F.2d 196, 201 (2d Cir.), *cert. denied*,

449 U.S. 1016 (1980); *Hays* v. *Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982); *Lenard* v. *Argento*, 699 F.2d 874, 885 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 69 (1983); *Languirand* v. *Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 2656 (1984); *Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983). To establish such an inference, however, the federal courts have generally held that the plaintiff must demonstrate that the municipality or its officials were placed on sufficient notice of widespread prior misbehavior. *See, e.g., Wellington* v. *Daniels, supra*, 717 F.2d at 936; *Bennett* v. *Slidell*, 728 F.2d 762 (5th Cir. 1984) (*en banc*), *cert. denied*, ___ U.S. ___, 53 U.S.L.W. 3882 (1985); *Herrera* v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981); *Dick* v. *Watonwan County*, 738 F.2d 939, 943 (8th Cir. 1984).[10]

The decision of the Court of Appeals in this case, however, does not purport to predicate the possible liability of Saugus and Forni for allegedly inadequate police training upon such an inference of a tacit municipal or supervisory policy authorizing or acquiescing in constitutional violations by Saugus police officers. Indeed, recognizing that the plaintiff in this case has utterly failed, notwithstanding extensive discovery, to demonstrate *any* pattern of police misconduct, the Court of Appeals has expressly rejected such an inference. 761 F.2d at 820. That Court, moreover, has affirmed the summary judgment granted by the District Court in favor of Saugus and Forni on plaintiff's claim that Saugus and Forni had established a policy or custom of the use of excessive force. 761 F.2d at 825. Thus, the judgment of the Court of Appeals remanding Petitioners for trial upon the plaintiff's allegations of inadequate police training stands alone, severed from any connection with any possible unconstitutional policy or custom allegedly maintained by Saugus and Forni.

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[10] A few courts, characterized by the Fifth Circuit as taking the "most expansive" view of *Monell*, *Bennett* v. *Slidell, supra*, 728 F.2d at 768 n.3, would permit an inference of municipal policy or custom acquiescing in or authorizing police misconduct from a single incident, where there is evidence that the municipality "completely fails" to train its police force, or trains its officers in a reckless or grossly negligent manner "so that future police misconduct is almost inevitable." *Leite* v. *Providence*, 463 F.Supp. 585, 590 (D.R.I. 1978). *Accord, Rymer* v. *Davis*, 754 F.2d 198, 200-201 (6th Cir. 1985), *vacated sub nom. Shepherdsville* v. *Rymer*, ___ U.S. ___, 53 U.S.L.W. 3911 (1985). Like the majority view, however, which permits such an inference only where a pattern of prior misconduct has put the municipality and its officials on notice, these courts view a systematic failure to train as *evidence* supporting an inference of unconstitutional policy or custom on the part of the municipality. *Id.*

Because Petitioners believe the Court of Appeals has gravely misconstrued this Court's decisions in holding that Petitioners may be liable under § 1983 for alleged omissions in the training of Saugus police officers in the absence of any municipal policy, or supervisory action, which is in itself unconstitutional, and because Petitioners believe that this issue is of fundamental importance to the law governing municipal liability under § 1983, Petitioners submit that this issue should be decided by this Court on *certiorari*.

B. *The Decision of the Court of Appeals Ignored This Court's Mandate in* Monell *That Municipal Policy or Custom Must Constitute the "Moving Force" of the Constitutional Violation.*

This Court has repeatedly stressed that causation bears exceptional significance in establishing municipal or supervisory liability under § 1983. With regard to municipal liability under § 1983, the Supreme Court in *Monell* firmly rejected *respondeat superior* as a basis of liability under § 1983, and held that only where the "*execution* of a government's policy or custom . . . *inflicts* the injury" may a municipality as an entity be liable under § 1983. 436 U.S. at 964 (emphasis added). The *Monell* Court noted that the express language of § 1983 precludes liability for the acts of an employee except where the government's policy "caused" the violation of constitutional rights. *Id.* at 692. Thus, a municipality's official policy must be "*the moving force* of the constitutional violation" in order to establish municipal liability under § 1983. *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981) (emphasis added).

Similarly, with regard to supervisory liability, this Court noted in *Rizzo* v. *Goode*, 423 U.S. 362 (1976) that a plaintiff must demonstrate an "*affirmative link*" between an incident of police misconduct and *the adoption of a plan or policy* by supervisory officials "*showing their authorization or approval of such misconduct.*" *Id.* at 371 (emphasis added). In the absence of "direct responsibility" for the actions of subordinates which deprive a plaintiff of his constitutional rights, the Court in *Rizzo* held that a mere failure to act with respect to supervision cannot support liability.

This Court reemphasized the central importance of causation in establishing municipal liability under § 1983 in its recent decision in *Oklahoma City* v. *Tuttle*, *supra*, 105 S.Ct. at 2436 and nn.7, 8. Holding that a single incident of police misconduct cannot supply an inference of a municipal "policy" of "inadequate training" and a further inference that the "policy" was the cause of the incident, the *Tuttle* Court observed:

> [S]ome limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

105 S.Ct. at 2436. The *Tuttle* Court also noted that, even assuming that a policy with respect to training which was not in itself unconstitutional could meet the "policy" requirement of *Monell*, "it is open to question whether a policymaker's "gross negligence" in establishing police training practices could establish a "policy" that constitutes a "moving force" behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required." *Id.* at 2436 n.7.

While the decisions of this Court have not fully defined *Monell's* requirement that municipal policy be "the moving force" of the constitutional violation, cases construing *Monell* in the federal courts of appeals have illuminated the causation requirement in a wide range of factual contexts. Thus, where a municipal policy directs the conduct by employees found to violate the plaintiff's constitutional rights, as in *Garris* v. *Rowland*, 678 F.2d 1264 (5th Cir.), *cert. denied sub nom. Fort Worth* v. *Garris*, 459 U.S. 864 (1982), where an unfounded and unlawful arrest was made in full accord with the policies and procedures of the city police department concerning arrests and arrest warrants, causation is clear.

While less direct, municipal policy authorizing, approving, or condoning acts of unconstitutional violence by police officers may be inferred from the municipality's continued failure to take disciplinary action in the face of widespread constitutional deprivations, as in *Herrera* v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981), where the city had been placed on repeated notice of nearly forty separate

complaints of police misconduct, but permitted its police force to continue its oppression of minorities. Where such a municipal "policy" of inaction is inferred, however, causation under *Monell* must rest upon the awareness of municipal employees that their misconduct is tacitly approved by the municipality. Thus, the Court of Appeals for the Fourth Circuit observed in *Milligan* v. *Newport News*, 743 F.2d 227, 230 (4th Cir. 1984) (emphasis added):

> [W]hile a municipality's "policy" of inaction need not be found to have effectively commanded the particular violation, *it must be of such a character that municipal employees could reasonably infer from it tacit approval of the conduct in issue*. For only so could the requisite causal connection between policy and constitutional deprivation be found. . . . *From this it follows that municipal liability may not be rested simply upon a failure to adopt policies that in retrospect can be seen to be a means by which particular unconstitutional conduct of its employees might have been averted*.

Accord, *Batista* v. *Rodriguez*, 702 F.2d 393, 398, 399 (2d Cir. 1983) (reversing jury verdict against municipality on grounds, *inter alia*, that there was no evidence that named police officers were aware of any alleged city policy condoning police violations of civil rights).

Recognizing that municipal and supervisory liability under § 1983 must be predicated upon a showing of direct, affirmative causation by which a municipal or supervisory policy inflicts the plaintiff's injury, the District Court in this case held that summary judgment for Saugus and Forni was appropriate, notwithstanding that the failure to send Vitale to a police training academy within the statutory period "might possibly" constitute gross negligence, because that failure could in no sense be said to be the "moving force" of Vitale's shooting of Voutour. The decision of the Court of Appeals, however, reverses the summary judgment granted by the District Court to Saugus and Forni on the ground that there exists an issue of material fact concerning whether the alleged failure properly to train Officer Vitale was the "*proximate cause*" of Voutour's injury. 761 F.2d at 821. In reaching that conclusion, the Court of Appeals erroneously applied a simple "but-for" causal analysis to the facts, holding that a jury could conclude that a trained officer would not have acted as Vitale had. 761 F.2d at 822.

The Court of Appeals substitution of "proximate cause" for *Monell's* requirement that municipal policy or supervisory action constitute the "moving force" directly causing plaintiff's injury is wholly inconsistent with this Court's decisions, and with the decisions of other federal courts of appeals. The Supreme Court's concern that municipal liability under § 1983 be predicated upon a showing that municipal policy or custom directly and affirmatively inflicted the constitutional injury, and the Supreme Court's rejection in *Rizzo* of any theory of liability predicated upon administrative negligence, *Polk County, supra*, 454 U.S. at 326, requires a finding on the issue of causation which goes far beyond the proximate cause standard adopted by the Court of Appeals. *See, e.g., Batista* v. *Rodriguez*, 702 F.2d 393, 399 (2d Cir. 1983) (jury instruction that plaintiff could recover upon a finding that pattern of police misconduct was the proximate cause of the violations of plaintiff's right "hardly amounted to a statement that the jury must first find that the City was the 'moving force' behind the officers' actions"). Moreover, the simplistic "but-for" analysis applied by the Court of Appeals was expressly disapproved by this Court in *Tuttle, supra*, 105 S.Ct. at 2436.

On this issue, the District Court was clearly correct: the record in this case contains *no* evidence that would permit a jury to find that any *policy* of Saugus or Forni with respect to police training "inflicted" Voutour's injury. The isolated failure of Saugus and Forni to provide Vitale, an experienced police officer, with an additional several-week training academy course, even if it constituted negligence, is far from the showing of "direct responsibility," *Rizzo*, 423 U.S. at 376, for Vitale's "split-second" decision to shoot to protect his partner's endangered life. As the Court of Appeals expressly found in partially affirming summary judgment for Saugus and Forni, Saugus and Forni at no time directed or condoned the use of excessive force by Vitale or other Saugus police officers. 761 F.2d at 820, 825. Indeed, Saugus and Forni implemented and enforced an affirmative, written firearms policy which restricted the authorized use of deadly force to life-threatening situations, in complete conformance with constitutional requirements. To nevertheless find an isolated omission in the training of a single officer to constitute the "moving force" behind a shooting incident which, if unjustified, directly contravened official Town policy, "blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983." *Rizzo*, 423 U.S. at 376.

C. *The Judgment of the Court of Appeals Ignored* Monell's *Mandate That Municipal Liability Under § 1983 be Predicated Upon Official Policy or Custom and Departed From This Court's Decision in* Tuttle, *and the Consensus Among Other Federal Courts of Appeals That Municipal Policy or Custom Cannot be Inferred From a Single Instance of Misconduct or a Single Failure in Training or Supervision.*

The fundamental basis for the imposition of liability under § 1983 upon a municipality is the existence of a municipal *policy* or *custom* which violates the constitutional rights of the plaintiff. *Monell*, 436 U.S. at 690-691, 694. As the Court of Appeals for the Eleventh Circuit recently emphasized, the question of whether municipal officials may have been negligent, or even "grossly negligent," in training police officers is simply *irrelevant* in the absence of evidence that such negligence was somehow in furtherance of municipal policy or custom. *Gilmere* v. *Atlanta, Ga.*, 737 F.2d 894, 902, 904 (11th Cir.), *reh. en banc granted*, 737 F.2d 912 (11th Cir. 1984). *Cf. Oklahoma City* v. *Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2436 (1985) (proof of "policy" of "inadequate training" requires evidence that policymakers deliberately chose a training program which would prove inadequate).

In this case, the Court of Appeals expressly found that Saugus and Forni had neither established nor acquiesced in any policy or custom of the use of excessive force by Saugus police officers. 761 F.2d at 820, 825. Moreover, the Court of Appeals acknowledged that, on the record before the District Court, compiled after two and one-half years of discovery, the plaintiff had adduced *no* evidence that any omissions in training were even *known* to Saugus, much less a result of municipal policy or custom. 761 F.2d at 823. To the contrary, as the Court of Appeals recognized, the undisputed record confirmed that "the Town followed the statutory mandate for police training as a matter of policy." *Id.* The undisputed record also established that Saugus and Forni provided substantial in-service training, including firearms training, to their police officers, *ante* at ___, that Saugus and Forni promulgated and strictly enforced an exemplary firearms policy that provided explicit guidance as to when and when not to shoot, *ante* at ___, and, as the Court of Appeals expressly found, that there had been no pattern of misconduct by Saugus police officers which might demonstrate inadequate police training. 761 F.2d at 820.

Nevertheless, despite the complete absence of any evidence of a defective municipal policy with respect to police training, the Court of Appeals remanded Saugus and Forni to trial on the basis that a triable issue exists concerning whether Forni had been "grossly negligent to the point of conscious indifference with respect to police training, and in particular Vitale's training," and whether such negligence proximately caused Voutour's injury. 761 F.2d at 822. In so holding, the Court of Appeals ignored *Monell's* mandate that official policy or custom is the only predicate for municipal liability under § 1983, and vitiated the salutary function of summary judgment to "pierce formal allegations of facts in the pleadings . . . ," *Schreffler* v. *Bowles*, 153 F.2d 1, 3 (10th Cir.), *cert. denied*, 328 U.S. 870 (1946), and to avoid unnecessary trial where there is no genuine issue of material fact. On the record assembled before the District Court, after two and one-half years of extensive discovery by all parties, there was simply *no evidence* of any municipal "policy" or custom of "inadequate training;" the record showed only that *one* officer had failed to attend a police training school within the time prescribed by statute. On that record, Saugus and Forni were entitled to the summary judgment granted them by the District Court. As the Court of Appeals for the First Circuit has remarked on another occasion, the party opposing summary judgment must at least point to some "glowing embers;" "'smoke alone is not enough to force the defendants to a trial to prove that their actions were not' improper." *Packish* v. *McMurtrie*, 697 F.2d 23, 27 (1st Cir. 1983), *quoting from Manego* v. *Cape Cod Five Cents Sav. Bank*, 692 F.2d 174, 177 (1st Cir. 1982).[11]

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[11] The opinion of the Court of Appeals suggests that Saugus may pursue the issue of whether there exists sufficient evidence in the record to create a jury question as to the extent of the Town's knowledge of and involvement in Forni's alleged training failures on summary judgment before the District Court. 761 F.2d at 823, 827. The Court of Appeals overlooks, apparently, that the Town has *already* moved for and been granted summary judgment by the District Court, and that, contrary to the Court of Appeals' suggestion, the issue of whether the record before the District Court established a triable issue as to the existence of any municipal policy with respect to the training or discipline of police officers which was the "moving force" of the plaintiff's injury was fully presented and briefed both before the District Court and the Court of Appeals.

As this Court has noted, an issue of fact, to be "genuine", must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First*

Moreover, by remanding Saugus and Forni to trial regarding the adequacy of police training upon evidence of a single omission in the training of a *single police officer*, the Court of Appeals departed from the teaching of this Court in *Oklahoma City* v. *Tuttle*, and from the clear consensus of an overwhelming majority of the federal courts of appeals, that municipal *policy* or *custom* cannot, as a matter of law and logic, be inferred from one incident of police misconduct or one omission in training or supervision. As this Court stated in *Tuttle*:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

105 S.Ct. at 2436.

Just as a single incident of unconstitutional conduct is insufficient, standing by itself, to show a municipal policy or custom which directs or acquiesces in the infliction of unconstitutional injury, *Tuttle, supra*, an isolated failure in the training or supervision of one officer cannot, as a matter of law, establish a municipal policy or custom of "inadequate training." For this reason, absent direct evidence of the existence of an impermissible municipal policy or custom with respect to training, the courts of appeals have required a showing either of a prior pattern of widespread police misconduct sufficient to place a municipality on notice that its police required supervision and training, or of a system-wide failure to train the municipality's police force; isolated omissions in training or supervision have been overwhelmingly rejected by those courts as a basis

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Nat. Bank v. *Cities Service Co.*, 391 U.S. 253, 289 (1968). On the record before the District Court, compiled at the close of two and one-half years of discovery, plaintiff had adduced no evidence of any municipal "*policy*" of "inadequate training". There is thus no justification for remanding Saugus to a further summary judgment proceeding before the District Court.

for municipal liability. *See, e.g., Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983); *Bennett* v. *Slidell*, 728 F.2d 762, 768 and n.3 (5th Cir. 1984) (*en banc*), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 53 U.S.L.W. 3882 (1985); *Turpin* v. *Maillet*, 619 F.2d 196, 202 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980); *Lenard* v. *Argento*, 699 F.2d 874, 885-886 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 69 (1983); *Dick* v. *Watonwan County*, 738 F.2d 939, 942 (8th Cir. 1984). As the Court of Appeals for the Fifth Circuit concluded following a comprehensive review of the case law:

> [A] municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.

Languirand v. *Hayden*, 717 F.2d 220, 227-228 (5th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2656 (1984) (emphasis added).

In this case there is, as the Court of Appeals expressly found, no evidence of any prior pattern of police misconduct. Nor, as shown *ante*, is there any evidence to show a municipal policy of providing inadequate training to Saugus police officers. Indeed, there is *no* evidence adduced by the plaintiff in the record before the District Court that *any* police officer, other than Vitale, was improperly trained in any respect. Rather, the record discloses only that Forni failed to send *one* otherwise fully trained officer, Vitale, to a police training school within a statutorily prescribed period.[12]

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[12] The Court of Appeals cites additional "evidence" to support its finding of a triable issue, but, with all deference, the "evidence" it relies upon cannot reasonably support the inferences it apparently draws. For example, the Court of Appeals quotes selectively (as apparent evidence of failures in training Saugus officers) a letter from one of Forni's subordinates regarding three unrelated shooting incidents by members of the Saugus Police Department. 761 F.2d at 822. The Court does not quote the conclusion drawn by the writer of the letter in the very next sentence, however, which does not indicate any dissatisfaction with Saugus' training program, but rather urges appropriate *disciplinary* action against officers who fail to abide by the Saugus Police Department's firearms policy: "Some sort of punitive action should be adminis-

As the Court of Appeals noted upon identical facts in *Languirand* v. *Hayden*, 717 F.2d 220, 229 (5th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2656 (1984), the failure to send one officer to a training academy "cannot be converted into *having* a policy of *placing* incapable police officers on patrol." In *Languirand*, as here, there was no evidence that any other police officer was not adequately equipped, by training, experience, and ability to competently perform his or her job. As the *Languirand* court concluded:

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tered if proven that an officer fails to use reasonable judgment when it comes to the use of his equipment." As the factual record before the District Court clearly and undisputedly confirms, *prompt disciplinary action was in fact taken* by Forni and Saugus against the two officers who were found to have violated the Saugus firearms policy; both were discharged. Thus, the decision of the Court of Appeals appears to draw an inference, based upon a partial reading of the record, that Forni had been placed on notice of allegedly inadequate police training methods, when the true record clearly demonstrates that the concern of the writer of the letter was directed to the need for appropriate disciplinary action to enforce the Saugus firearms policy and training. Saugus and Forni called the attention of the Court of Appeals to its error, together with numerous other material errors of fact, in their request for rehearing, but the Court inexplicably declined to correct the record on this point.

Similarly, the Court of Appeals pointed to a statement made by Forni in an undated proposal for reorganization of the Saugus Police Department, requesting additional funds for in-service training because "in-service training at roll-call for 30 minutes is not adequate or effective." 761 F.2d at 822. The Court of Appeals clearly seeks to infer from this statement that Saugus in fact provided inadequate training to its officers. Yet the plaintiff has adduced no evidence whatsoever that Forni's request for additional funds was not promptly acceded to by the Town; indeed, the record demonstrates that in the period prior to Voutour's injury in-service training was conducted in full hour sessions, not the 30 minute sessions described by Forni in the undated proposal.

Finally, and most disturbingly, the Court of Appeals appears to rely heavily upon a highly-conclusory "affidavit" submitted by a purported expert for the plaintiff, 761 F.2d at 821-822, notwithstanding the Court's express recognition that that affidavit, which was the subject of Petitioners' undecided motion to strike as defective under Fed.R.Civ.P. 56(e), had never been determined, either by the District Court or by the Court of Appeals, to be admissible. *Id.* The reliance by the Court of Appeals upon an affidavit whose admissibility before the District Court remained in dispute was clearly improper. That "affidavit," which is based solely upon the affiant's review of the materials and pleadings in the record, is in any event clearly mistaken in its assertion that Saugus and Forni failed to provide "job-relevant" firearms training. Far from being limited to the "mechanics" of firearms handling and use, as that affidavit alleges, the record clearly confirms that the firearms training provided by Saugus and Forni, together with its written firearms policy, gave explicit instruction with respect to situations in which firearms use was proper or improper. (A. 137-138, 184-185, 708-710).

> What we are dealing with here, so far as this record discloses, is one isolated incident in which the police chief negligently, or grossly negligently, allowed one particular inadequate officer to go on patrol, and this officer's inadequacies resulted in one particular incident of negligent or grossly negligent injury to a citizen. Grievous and regrettable as that incident and injury indisputably are, that does not convert this case to one of municipal policy or custom under section 1983.

717 F.2d at 229.

Because the plaintiff in this case failed completely, even after two and one-half years of exhaustive discovery, to present *any evidence whatsoever* of a policy or custom on the part of Saugus of inadequate training, Saugus was entitled, as a matter of law, to the summary judgment granted by the District Court. The judgment of the Court of Appeals remanding petitioners to trial, on evidence of a single omission in the training of *one* police officer, violates *Monell*'s mandate that only official policy or custom may form a basis for municipal liability under § 1983, and should be reviewed by this Court on *certiorari*.

D. *By Denying Police Chief Forni Qualified Immunity on the Grounds That His Alleged Conduct in Failing to Train Properly a Police Officer, While Neither in Itself Violating Any Constitutional Rights of the Plaintiff, Nor Supporting or Acquiescing in the Use of Excessive Force, Made a Constitutional Violation Committed by That Police Officer "Likely to Arise," the Court of Appeals Departed From the Holding of* Harlow.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In remanding this action for trial the Court of Appeals, in a footnote, rejects Forni's qualified immunity defense. 761 F.2d at 822 n.7. In so doing, the Court of Appeals departs sharply from the decisions of this Court defining the law applicable to the assertion of qualified immunity by a government official.

The holding by the Court of Appeals regarding Forni's qualified immunity defense makes Forni liable not for conduct of his own

which directly violated constitutional rights of another, but for a violation committed by a subordinate officer, Vitale, which the Court of Appeals concludes was causally linked to an omission in Forni's training of that officer. The Court of Appeals misconstrues *Harlow* v. *Fitzgerald* as permitting such liability where the government official "should have known" that the constitutional violation committed by a third party would be "likely to arise." 761 F.2d at 822 n.7.[13]

As this Court's decision in *Harlow* makes clear, however, the knowledge for which an official is responsible is not of the possibility of constitutional violations by others, but rather knowledge that *his* conduct violates constitutional rights "of which a reasonable person should have known." It is this inquiry — whether the law clearly established a constitutional right violated by the *official's conduct* — which forms the objective predicate for a denial of qualified immunity.

The conclusion of the Court of Appeals that Forni "should have known" of the likelihood of Vitale's conduct wholly overlooks the relevant inquiry — whether Forni should have known that *his* conduct in the training of Vitale could violate a constitutional right of Voutour's. Forni did not, of course, participate in the shooting of Voutour; moreover, Forni was expressly found by the Court of Appeals neither to have established nor acquiesced in *any* unconstitutional policy of excessive force by Saugus police officers. Forni's conduct thus did not in itself violate any constitutional right of the plaintiff, and he is entitled to qualified immunity.

The holding of the Court of Appeals to the contrary is, in essence, a determination that a police chief may be liable under the Constitution for gross negligence in the training of his police officers, *unrelated* to any unconstitutional policy or act by the police chief. The Court of Appeals has thus created, in this decision, a *de facto constitutional* right in the plaintiff to be free from the consequences of gross negligence in police training, and a corresponding duty

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[13] The Court of Appeals adopts similar reasoning in determining that Vitale's partner, Wheeler, *is* entitled to qualified immunity, concluding that Wheeler could not reasonably be held to have known as he approached Voutour's car that Vitale would eventually use excessive force against Voutour, and expressly holding that "it was Vitale's use of excessive force that is the constitutional violation Wheeler would have to have 'known' would occur." 761 F.2d at 819.

upon Forni to take affirmative action to avoid such negligence. Wholly apart from its validity under current law, however, this holding departs dramatically from the contours of municipal and supervisory liability under § 1983 as they were understood in February, 1977, the time of this incident and the time as of when Forni's qualified immunity defense must be evaluated.

In 1977, the applicable law regarding a police chief's liability for failures in the training of police officers was that expressed by this Court in *Rizzo* v. *Goode*. In that case, this Court unequivocally rejected the imposition of any general federal constitutional duty upon police supervisory officials to supervise or train police officers; liability could attach to the supervisory officials only for their *own* "direct responsibility" in adopting policies which authorize or acquiesce in the deprivation of constitutional rights. 423 U.S. at 373-377. The law regarding supervisory officials' liability under § 1983 was further articulated in the First Circuit in *Kostka* v. *Hogg*, 560 F.2d 37 (1st Cir. 1977), in which the Court of Appeals, applying *Rizzo*, flatly held that a complaint which alleged that a breach by a police chief of his duty to instruct and control his police officers, resulting in an unjustified shooting by such an officer, failed "even to plead a constitutional violation", in the absence of *active participation* by the chief in the wrongdoing. 560 F.2d at 40.

Thus, in 1977, when plaintiff's claim arose, Forni could not reasonably have anticipated that eight years later the Court of Appeals would find that a single omission in the otherwise full training of one police officer, on an otherwise adequately trained and well-disciplined police force, could render him liable for a constitutional violation committed by that police officer. As the Supreme Court has stressed, where the applicable law was not clearly established at the time an action occurred, "an official could not be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as lawful." *Harlow* v. *Fitzgerald, supra,* 457 U.S. at 818. Even if the holding by the Court of Appeals that Forni's conduct may have violated Voutour's rights is correct as a matter of law, which Saugus and Forni deny, Forni cannot be held to have anticipated the Court of Appeals' departure from the law as he understood it in 1977, and he is entitled to qualified immunity.[14]

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[14] Nor can Forni's failure to comply fully in training Officer Vitale with the requirements of Massachusetts General Laws c. 41, § 96B, requiring regular

Conclusion.

Because petitioners believe the decision of the Court of Appeals in this case drastically expands the liability of municipalities and their supervisory officials under § 1983, in contravention of this Court's decisions and the consensus among other federal courts of appeals, and presents fundamental issues concerning the nature of the conduct for which a municipality and its officials may be liable under § 1983 which should be resolved by this Court, Petitioners respectfully request that this Court grant a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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police officers to be sent to training academies within 9 months of their appointment as a regular officer, be held to have deprived Forni of his qualified immunity defense. As this Court has recently made clear, "officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis* v. *Scherer*, ___ U.S. ___, 104 S.Ct. 3012, 3020 (1984). As this Court noted in *Davis* v. *Scherer*, *Harlow's* holding that officials may lose their immunity by violating "clearly established statutory . . . rights", 457 U.S. at 818, speaks only to a situation where the plaintiff seeks to recover damages directly for violation of such statutory rights, as in *Harlow* itself. 104 S.Ct. 3020 n.12. The Court stated: "Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation — of federal or of state law — unless that statute or regulation provides the basis for the cause of action sued upon." *Id*. The Supreme Court in *Davis* v. *Scherer* flatly rejected the plaintiff's argument that qualified immunity could be lost where an official violates a statute that does not provide a direct cause of action to the plaintiff, but merely "advanced important interests or was designed to protect the constitutional rights." *Id*. at 3020.

It is clear that in this case Voutour can assert no cause of action for damages predicated directly upon a violation of the requirements of G.L. c. 41, § 96B, for that statute provides a plaintiff no such cause of action. Nor, as the Court in *Davis* v. *Scherer* expressly held, can Forni be deprived of his qualified immunity defense on the basis that G.L. c. 41, § 96B "protected" Voutour's constitutional rights.

Appendix.

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Appendix A.

[PAGE 1]

United States Court of Appeals For the First Circuit

No. 84-1159

JAMES T. VOUTOUR,
Plaintiff, Appellee,
v.
HAROLD VITALE, ET AL.,
Defendants, Appellants.

No. 84-1214

JAMES T. VOUTOUR,
Plaintiff, Appellant,
v.
HAROLD VITALE, ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Bownes, *Circuit Judge*,
and Perez-Gimenez,* *District Judge*.

---

* Of the District of Puerto Rico, sitting by designation.

Richard L. Neumeier with whom *James F. Meehan, Cheri L. Crow* and *Parker, Coulter, Daley and White* were on brief for James T. Voutour.

Alan Garber with whom *Philip A. Mason* and *Mason and Martin* were on brief for Harold Vitale.

Gael Mahony with whom *Michael S. Greco, Robert G. Dreher* and *Hill and Barlow* were on brief for Town of Saugus and Fred Forni.

Richard M. Magnan with whom *George O. Gregson* was on brief for Howard Wheeler.

March 29, 1985

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PER CURIAM. This appeal is from the judgment entered in a section 1983 civil rights action and pendent state tort claim arising out of the shooting of plaintiff James T. Voutour by a Saugus police officer, defendant Harold Vitale. We start with a capsulated account of the circumstances leading to the shooting.

THE FACTS

Voutour and two companions, Dennis MacDonald and Lawrence Dionne, spent the night of Sunday, February 13, 1977, and early Monday morning driving around in an automobile just acquired that afternoon by Voutour. The car was in poor condition; the tires were bad, the brakes did not operate properly, and one headlight was burned out. The car was neither registered nor insured. Sometime early Monday morning, Voutour drove to the parking lot of Gibbs Ford. When he got there, he noticed a police cruiser. The cruiser was manned by Vitale and a subordinate, defendant Howard Wheeler. Vitale and Wheeler were looking for a vehicle that had been involved in an automobile accident earlier that night.

There are two different versions of what happened at the Ford lot. Wheeler's version is that he noticed the Voutour vehicle and started towards it on foot when it suddenly accelerated, turned around, passed him, proceeded the wrong way for a time on an exit ramp off Route 1 and then drove away. As the car started to accelerate, Wheeler shouted

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"stop" and noted its license plate number as it went by him. Voutour testified that, because of the condition of his car, he did not want any problems with the police, so when he saw the cruiser he turned around, left the parking lot, went the wrong way for a short distance on the exit ramp, and then proceeded on his way. He was not aware that the police had seen the car and heard no command to stop.

Voutour's intention was to drop MacDonald off near his home. In order to avoid the police, he took an indirect route.

Before he got to MacDonald's drop-off corner, Voutour stopped the car temporarily so MacDonald's tape deck could be detached from the dash. He pulled over to the side of the road, kept the engine running and put the gear shift lever in the park position. A short time later, Vitale and Wheeler, who were looking for the Voutour vehicle, passed the parked car, backed up and stopped the cruiser about a car's length behind the Voutour vehicle. After determining that the car was the same one that they had seen at the Gibbs Ford lot, it was decided that Wheeler would question the occupants. The cruiser did not have its flashing blue lights on, nor was the siren used. Wheeler left the cruiser without wearing his police hat. There is a dispute as to whether Wheeler had both a gun and a flashlight in his hands as he approached the car or just a flashlight. When Wheeler got to the door on the passenger's side of the car, Voutour started to accelerate.

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The car skidded slightly, grazing Wheeler who grabbed the door handle and continued to hang onto it as the car moved forwards.

Again, there are two versions of what happened next. Voutour says that as soon as he realized Wheeler was a policeman, he started to slow down, opened the door, put his left foot out and was starting to put the car in park when he was shot. Vitale testified that he got out of the cruiser, saw the Voutour vehicle start up with Wheeler being dragged down the road. He yelled for the car to stop, but it did not slow down. He then decided that in order to save the life of his partner, he had to stop the car by shooting the driver. He drew his revolver and fired at the driver's shoulder. There is no dispute that the shot hit Voutour in the neck rendering him a permanent quadriplegic.

PROCEDURAL HISTORY

Voutour sued both Vitale and Wheeler under 42 U.S.C. § 1983 and also filed a pendent assault and battery claim against Vitale under Massachusetts law. He brought a section 1983

action against the Town Chief of Police at the time of the shooting, Fred Forni, and against the Town of

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Saugus.[1] Over a year before the trial, the district court allowed motions for summary judgment filed by Wheeler, Forni, and the Town on all claims against them. The jury returned a verdict which, in effect, found Vitale not liable on the section 1983 count, but liable on the state assault and battery count; it awarded Voutour damages against Vitale in the amount of $1,100,000. Both Voutour and Vitale have appealed.

VITALE JURY VERDICT

The jury found Officer Vitale not liable to Voutour under section 1983 but liable for assault and battery under the law of Massachusetts. Both plaintiff and defendant seek to have this verdict overturned on the ground that written questions submitted by the jury to the district judge after the case had gone to the jury, and the judge's written responses thereto, were not disclosed to counsel until after the verdict.

At the close of the trial, the court put three special questions to the jury. Question #1, which was to be answered "yes" or "no," was whether defendant Vitale had shot plaintiff under circumstances in which the use of deadly force was so unreasonable as to violate plaintiff's constitutional rights. Question #2, which was to be answered in a similar

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way, was whether defendant Vitale had been justified under state law in using deadly force against plaintiff. Question #3, which had three parts, concerned the amount of damages to be awarded to compensate plaintiff for his injuries, for the violation of his constitutional rights, and for other punitive damages.

During its deliberations, the jury sent the district judge the following note:

---

[1] Voutour also filed a state assault and battery claim against Wheeler and state negligence claims against all defendants. These claims seem to have been abandoned during the course of the litigation and have not been raised by any of the parties on appeal. Accordingly we do not address them.

Your Honor:

If the answer to question #1 is — no + the answer to question #2 is — yes — may — we turn to page two + fill in any dollar amount.

The district court did not notify counsel of this inquiry, but instead sent the following written response:

Members of the Jury:

You must answer question 3 only if the answer to Question 1 is yes and/or the answer to Question 2 is no.

Thereafter, the jury sent another note to the judge which read:

Your Honor:

This may be a funny question, But is there any way question #2 can be worded different. We feel that officer Vitale had a right to shoot to protect his partner, but Jimmy Vouture (sic) did not know he was endangering an officer's life, so he was also some-what not wrong.

Again, without notifying counsel the judge responded in writing:

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Members of the Jury:

I cannot word Question 2 in any other way. It asks you to answer the only question which is legally relevant concerning Mr. Voutour's claim under state law. That question concerns Mr. Vitale's conduct and, particularly, whether he was "justified" in shooting Mr. Voutour, as I had explained that term.

The jury then sent the judge a written note asking:

> Your Honor:
> I hate bothering you again. But could you please write me a definition of Justification + also write to me briefly the State Law relative to #2.
> Thank you.

At this point, the judge contacted counsel for the first time. She told them that she had received the latter note and read it to them. She also informed them that there had been earlier questions from the jury which she had not disclosed to counsel because some of these were "too suggestive of what the jury was doing." The judge did not show the earlier notes to counsel but promised that she would do so after the jury had rendered its verdict and that she would allow any objections at that time. The jury was then brought in and the judge issued supplementary instructions on the state law claim.

Thereafter, the jury returned a split verdict, finding for the defendant Vitale on the section 1983 claim, but for the plaintiff Voutour on the state assault and battery

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claim. The court, as it had promised, later revealed all of the earlier questions it had received from the jury and its responses. Vitale filed a motion for judgment n.o.v. or new trial, claiming that he had been prejudiced by the district court's secret instructions. The district court denied the motion.

On appeal Vitale renews his argument claiming that the district court's failure to notify counsel of the content of the jury's earlier requests was prejudicial and deprived him of the opportunity to prevent what he characterizes as a compromise verdict. He is joined by plaintiff who also claims that he was

prejudiced by the district court's secret instructions to the jury. Both parties seek a new trial as to all counts.[2]

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We are guided here by the Supreme Court's holding in *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76 (1919), that "written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object." *Id.* at 81. As the Court pointed out:

> It is not correct . . . to regard the opportunity of afterwards excepting to the instruction and to the

---

[2] Originally Voutour requested only a partial new trial with respect to the section 1983 count on which he was unsuccessful. However, at oral argument, counsel conceded in response to questions put to him that a new trial would be proper as to everything. The exchange was the following:

> JUDGE BOWNES: Why shouldn't there be a trial on everything?
>
> COUNSEL: Well, Your Honor, quite frankly, I've been persuaded that probably the better rule, although we argued for a different result here, is that there should be a new trial on everything. We do suggest a way to rationalize having a new trial only on the federal count, but on reading the reply brief filed by Vitale, we realize that we have very much an uphill battle on that, given the way the Supreme Court has construed Rule 59. But I would prefer a new trial on both counts, as opposed to affirmance as to what happened in the district court.
>
> JUDGE BOWNES: Well, what are you fighting about? Everybody wants a new trial.
>
> COUNSEL: . . . Both sides emphasize that the district court made a mistake in giving secret instructions to the jury without consulting with counsel.
>
> JUDGE BOWNES: . . . Now, it would appear that you and Vitale agree that there ought to be a new trial.
>
> COUNSEL: We agree on that.
>
> JUDGE BOWNES: So the only issue as far as you are concerned is whether or not summary judgment was correct as to Wheeler and the Town.

> manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice

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> and mistrials due to inadvertent errors may be thus obviated.

Id. at 82. The Court also held that secret instructions which incorrectly state the law are "presumptively injurious." *Id.* Other Supreme Court decisions have made clear that even when the secret communication does not misstate the law, a new trial may be warranted if it has affected the outcome by subtly influencing the jury. *See United States* v. *United States Gypsum Co.*, 438 U.S. 422, 460-61 (1978); *Rogers* v. *United States*, 422 U.S. 35, 38-40 (1975). *See also Vogel* v. *American Warranty Home Service Corp.*, 695 F.2d 877, 881 (5th Cir. 1983); *United States* v. *Burns*, 683 F.2d 1056, 1058-59 (7th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983); *Krische* v. *Smith*, 662 F.2d 177, 179 (2d Cir. 1981); *Petrycki* v. *Youngstown & Northern Railroad Co.*, 531 F.2d 1363, 1366-67 (6th Cir. 1976).

In *United States* v. *Flaherty*, 668 F.2d 566 (1st Cir. 1981), we held that, although subject to the harmless error rule, secret communications between the judge and the jury create a presumption of prejudice and that the other party has "a heavy burden . . . to show that no prejudice resulted." *Id.* 602.

Here the notes sent to the judge by the jury suggest that the jury thought that neither Vitale nor Voutour were wholly at fault and that the jurors didn't quite know how to articulate this in their verdict. In the circumstances, had

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counsel been informed of the notes and received an opportunity to comment,

it is at least conceivable that the court would have framed its instructions differently and that a different outcome could have resulted. To be sure, the court's answers contained no misstatement of the law; and had the opposing party not conceded prejudice we might hesitate to reverse notwithstanding the court's error. Given, however, both Voutour's and Vitale's insistence that the incident was prejudicial, the desire of each of them for a new trial on these claims, and the fact that a trial must be had with respect to other related claims, we vacate and order a new trial with respect to so much of the judgment as both dismissed Voutour's section 1983 count against Vitale and awarded to Voutour the sum of $1,100,000 against Vitale on the state law assault and battery count.

SUMMARY JUDGMENT

The district court did not permit Voutour's claims against Officer Wheeler, Chief of Police Forni, and the Town of Saugus to go to trial. Instead, it entered summary judgments in favor of Officer Wheeler, Chief of Police Forni, and the Town of Saugus more than a year prior to the trial. Voutour now challenges the court's granting of summary judgment on these claims. Our review is confined to an examination of the materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial

nor the verdict is relevant. Summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Our standard of review is well established:

> In determining whether summary judgment is appropriate, we must "look at the record . . . in the light most favorable to . . . the party opposing the

> motion," *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962), indulging in all inferences favorable to this party. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam); *Santoni* v. *Federal Deposit Insurance Corp.*, 677 F.2d 174, 177 (1st Cir. 1982); *Hahn* v. *Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976). Reversal of a grant of summary judgment is required when issues of fact which were adequately raised before the district court need to be resolved before the legal issues in the case may be decided. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-90, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968); *Over The Road Drivers, Inc.*, v. *Transport Insurance Co.*, 637 F.2d 816, 818 (1st Cir. 1980).

Emery v. *Merrimack Valley Wood Products, Inc.*, 701 F.2d 985, 986 (1st Cir. 1983).

It is against this rigorous standard that we proceed to examine the court's dismissal of the claims against Wheeler, the Chief, and the Town.

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Officer Wheeler

We consider first the grant of summary judgment in favor of Officer Wheeler on Voutour's section 1983 claim against him. Voutour sought to hold Vitale's partner, Wheeler, liable under section 1983 on the theory that Wheeler's approach to plaintiff without sufficiently identifying himself as a police officer was foreseeably linked to Vitale's later conduct in shooting Voutour. While it was Vitale's, not Wheeler's, conduct that allegedly deprived Voutour of "rights, privileges, or immunities secured by the Constitution and laws," in purported

violation of section 1983,[3] Wheeler is said to share responsibility for the ultimate act of violence because of his initiation of a chain of events which caused Vitale to shoot in defense of Wheeler. In rejecting this theory, the district court found that "while Wheeler's actions might be viewed as having proximately caused plaintiff's injury, as a matter of law the affidavits do not support the conclusion that Wheeler's acts were so careless and reckless as to show the utter indifference to resulting consequences upon which a finding of gross negligence can be predicated."

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On appeal, plaintiff challenges the use of a gross negligence standard as to Wheeler. He claims that simple negligence, not gross negligence, is the appropriate standard for a section 1983 claim for deprivation of liberty without due process of law in violation of the fourteenth amendment. The determination whether simple or gross negligence applies, and its implications for this case, are shrouded in the mists that presently envelop this area of the law.[4] But, acting

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by such lights as are

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[3] This circuit has recognized that the use of excessive or unreasonable force or violence by law enforcement personnel resulting in personal injury deprives a person of liberty without due process of law in violation of the fourteenth amendment. *Landrigan* v. *City of Warwick*, 628 F.2d 736, 741-42 (1st Cir. 1980). *See also Shillingford* v. *Holmes*, 634 F.2d 263, 265 (5th Cir. 1981); *Johnson* v. *Glick*, 481 F.2d 1028, 1032 (2d Cir.), *cert denied*, 414 U.S. 1033 (1973).

[4] In *Parratt* v. *Taylor*, 451 U.S. 527 (1981), the Supreme Court held that the *negligent* taking of a prisoner's *property* as a result of a random and unauthorized act by a state employee acting under color of law amounted to a deprivation of property within the context of the fourteenth amendment. *Id.* at 536-37. The Court went on to hold, however, that such a deprivation is not without due process of law (and hence not actionable under section 1983) when the state provides a post-deprivation tort remedy under which the respondent can obtain compensation for his loss. *Id.* at 541. This holding has been subsequently extended to *intentional* deprivation of property. *See Hudson* v. *Palmer*, 52 U.S.L.W. 5052 (July 3, 1984).

It is yet unclear whether this approach will be applied to deprivations of life or liberty under the fourteenth amendment. *See* Note, *Due Process Application*

available, we do not believe that an actor as remote from the primary civil rights violation as Wheeler is to be held liable under section 1983.

Wheeler raised a good faith immunity defense under section 1983, and we have recognized the applicability of such a defense in cases of this nature. *See Connors* v. *McNulty*, 697 F.2d 18, 21 (1st Cir. 1983); *DeVasto* v. *Faherty*, 658 F.2d 859, 865 (1st Cir. 1981). *See also Pierson* v. *Ray*, 386 U.S. 547 (1967). In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court set out the standard to be applied, holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory

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of the Parratt Doctrine to Random and Unauthorized Deprivations of Life and Liberty, 52 Fordham L. Rev. 887 (1984) (arguing that the doctrine should be so applied); Note, *Parratt* v. *Taylor: Don't Make a Federal Case Out of It*, 63 B.U. L. Rev. 1187 (1983) (same); *compare with* Note, *Defining the Parameters of Section 1983: Parratt v. Taylor*, 23 B.C. L. Rev. 1218 (1982) (taking the opposite view). *See also* R.A. Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company*, U. Ill. L.F. 831 (1982). Some courts have begun to do so, *see, e.g., Thibodeaux* v. *Bordelon*, 740 F.2d 329 (5th Cir. 1984), *cf. Augustine* v. *Doe*, 740 F.2d 322 (5th Cir. 1984) (holding that *Parratt* is limited to procedural due process violations), even in cases such as the present involving use of excessive force in an attempted arrest. *See Gilmere* v. *City of Atlanta*, 737 F.2d 894 (11 Cir.), *reh. granted*, 737 F.2d 922 (1984).

Plaintiff has relied on *Parratt* to argue that *negligence* provides a basis of recovery under section 1983. But we cannot apply that aspect of *Parratt* without also looking into *Parratt's* primary teaching, *i.e.*, asking whether the existence of an adequate state negligence remedy affords sufficient process to vitiate any section 1983 claim here. A case can be made for such a result, bearing in mind that Wheeler himself committed no violence against Voutour, being linked to the shooting solely by alleged negligence. If section 1983 is to be reserved for violations of civil rights as commonly understood, it might be reasonable to hold that although Vitale's use of excessive force, if proven, violated section 1983, Wheeler's unwitting negligence did not.

Since, however, Wheeler raised a good faith immunity defense and we are deciding the issue on that ground, we do not attempt to resolve the partial or total applicability of *Parratt* here.

or constitutional rights of which a reasonable person would have known." *Id.* at 818. Under this

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standard we believe the district court was correct in entering summary judgment for Wheeler.

Judging the facts in the light most favorable to plaintiff, the record before the district court showed that on the night of the shooting Wheeler had stealthily approached the Voutour vehicle without prior warning, not wearing his uniform hat and with a drawn gun in his hand. These facts, while arguably capable of sustaining a jury finding of negligence or even gross negligence, could not, we think, support the conclusion that the particular constitutional violation (*i.e.*, the shooting of Voutour by Wheeler's partner in violation of Voutour's civil rights) was a result which a reasonable person in Wheeler's position "would have known."

To be sure, a reasonable person in Wheeler's shoes might arguably have surmised that some sort of chaotic situation would arise from the arrestee's failure to realize he was being approached by police. But this is different from saying that a reasonable man in Wheeler's position would have known as he was approaching Voutour's car in the way described that Vitale would eventually use excessive force against Voutour — and it was Vitale's use of excessive force that is the constitutional violation Wheeler would have to have "known" would occur. The Supreme Court has admonished that the fourteenth amendment should not be turned into "a font of tort law to be superimposed upon whatever systems may

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already be administered by the states." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). We affirm the district court's grant of summary judgment with respect to the section 1983 claim against Officer Wheeler.

Chief of Police

The court also granted summary judgment, based on such materials as were then before it, on Voutour's claims against the Chief of Police and the Town of Saugus. With respect to the

Chief of Police, the complaint makes these allegations: that the Chief "condoned, encouraged, and acquiesced in defendant Vitale's prior use of excessive force and characterized such conduct as part of defendant Vitale's duties" and that the Chief had a duty to undertake "reasonably adequate procedures in the selection, assignment and training of police officers to prevent said officers from misusing firearms and from committing unlawful acts of violence" and "if any selection, assignment and training was done it was undertaken in a reckless and grossly negligent manner," all or any of which, it was alleged, proximately caused the shooting of Voutour. We construe this somewhat ambiguous language to allege a failure to train the Town's police officers properly in the use of firearms and also that it was a custom of the police department to use excessive force.

As the action against the Chief is based solely on section 1983, our initial inquiry is "(1) whether the conduct

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complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981). There can be no doubt that the first of these requirements was met; the conduct in question was committed by a chief of police acting in his official capacity. The second requirement contains two distinct elements. To begin with, there must have been a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States. Here the deprivation would consist of Vitale's alleged use of excessive force in shooting Voutour. *See* note 3, *supra*. The harder question is whether the Police Chief's conduct can be said to have caused this deprivation, so as to make the Chief liable under section 1983. The Supreme Court has firmly rejected *respondeat superior* as a basis for section 1983 liability of supervisory officials, *Monell* v. *Department of Social Serv-*

ices, 436 U.S. 658, 694 n.58 (1978) (citing *Rizzo* v. *Goode*, 423 U.S. 362, 370-71 (1976)), or municipalities, *Monell*, 436 U.S. at 691. The Court has said that the language in section 1983, "subjects, or causes to be subjected," should not be construed to include vicarious liability, which is based on considerations of public policy rather than fault or causation. Nonetheless, lower courts have suggested that the

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statutory language is broad enough to extend liability to those not personally involved in the deprivation of constitutional rights. *McClelland* v. *Facteau*, 610 F.2d 693, 696 (10th Cir. 1979). Such situations are limited, however, to ones showing an "affirmative link" between the conduct of the supervisor and that of the employee. *Rizzo*, 423 U.S. at 371.

In the case at hand, the plaintiff has advanced two theories linking the Police Chief's conduct to the shooting of Voutour by Officer Vitale: the Police Chief is charged with having established a policy or custom of using excessive force and the Chief did not properly train police officers in the use of firearms.

We agree with the district court that "[p]laintiff has adduced no evidence to show a pattern of violent police behavior which might support an inference that the Chief of Police supported or acquiesced in such behavior." Even if we were to credit complaints of police brutality as well as complaints of other shootings, we cannot see that they form a pattern of police violence so striking as to allow an inference of supervisory encouragement, condonation, or even

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acquiesence.[5] *Cf.*

[5] Plaintiff, in his brief, makes much of an incident involving Officer Vitale which occurred on January 10, 1976, at the Hilltop Steak House restaurant. It was alleged that Officer Vitale, who was on duty with another police officer, pushed a patron against the wall, put handcuffs on him and took him into custody without justification. The patron was released within a short time and rejoined his party. After learning of the incident, the Chief obtained reports from the officers present and, on the basis of their reports, Vitale was exonerated. A civil suit subsequently brought against the Town by the aggrieved

Herrera v. *Valentine*, 653 F.2d 1220, 1225 (8th Cir. 1981) (in addition to proving 40 separate incidents of police misconduct, plaintiffs showed that these incidents had been brought to the attention of supervisory officials).

The claim of lack of police training in the use of firearms or training that was undertaken in an inadequate manner is, however, a different matter. In its opinion granting the Chief's motion for summary judgment, the district court held that under section 1983 *gross* negligence would have to be shown before liability would attach. The court went on to find that it might be possible for a jury to find gross negligence on the part of both the Police Chief and the Town for their failure to train Officer Vitale, but that nonetheless "summary judgment for these defendants is still warranted because the affidavits in no way support the inference that such negligence was the 'moving force' behind

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or even a proximate cause of plaintiff's injury," (citing *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981)).

We agree with the district court that a section 1983 claim based on lack of proper police training requires, at very least, proof of gross negligence both as to the Police Chief and the Town.

We have found no case holding squarely that simple negligence by a police chief in training subordinate police officers is sufficient to anchor section 1983 municipal liability. In the light of *Monell*'s requirement that official policy must be "the moving force of the constitutional violation," 436 U.S. at 694, and the holding of *Rizzo* that a general allegation of administrative negligence fails to state a constitutional claim under section 1983, 423 U.S. 370-377, we believe that significantly

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patron was settled. Distressing as Vitale's conduct might have been on this occasion, this isolated incident cannot form the predicate for the customary use of excess force by the Saugus Police Department. *Landrigan* v. *City of Warwick*, 628 F.2d 736, 746 (1st Cir. 1980).

more than simple negligence in police training is necessary for municipal liability under section 1983. Like most other courts that have addressed the matter, we hold that the supervisor must demonstrate at least gross negligence amounting to deliberate indifference, and that this conduct must be causally linked to the subordinate's violation of plaintiff's civil rights. *See Languirand* v. *Hayden*, 717 F.2d 220, 227 (5th Cir. 1983) ("failure to train must constitute gross negligence amounting to conscious indifference"); *Hays* v. *Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982) (municipal liability only where there is a

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complete failure to train or training is so reckless or grossly negligent that future police misconduct is almost inevitable); *Herrera* v. *Valentine*, 653 F.2d at 1224 (failure to train or grossly negligent training); *Owens* v. *Haas*, 604 F.2d 1242, 1246 (2d Cir. 1979) (gross negligence or "deliberate indifference"); *Leite* v. *City of Providence*, 463 F. Supp. 585, 591 (D.R.I. 1978) (simple negligence not enough, "training must be nonexistent or reckless, or grossly, palpably, and culpably neglected").

When ruling on the motion for summary judgment, the district court concluded that the record contained sufficient facts from which a jury could have found gross negligence on the part of both the Police Chief and the Town. We agree with this conclusion, for reasons mentioned below. The district court went on to say, however, that the record did not admit of an inference that such gross negligence was the proximate cause of plaintiff's injury. With this latter point we disagree. After reviewing the record that was then before the court in the light most favorable to the plaintiff, we conclude that there was a genuine issue of material fact concerning whether the alleged failure to properly train Officers Vitale and Wheeler was the proximate cause of Vitale's alleged use of excessive force against Voutour.

With respect to proof of gross negligence, this case is distinguishable from many others in that the materials

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before the court indicated that the Police Chief had violated state law by failing to provide Vitale, and possibly also Wheeler, with any police training whatsoever.

Massachusetts law requires that

> "*[e]very person* who receives an appointment to a position on a permanent full-time basis in which he will exercise police powers in a municipal police department . . . *shall prior to exercising any police powers,* be assigned to and satisfactorily complete a prescribed course of study at a regional or municipal police training school, approved by the Massachusetts criminal justice training council . . . .

Mass. Gen. Laws ch. 41, § 96b (1979) (emphasis added). The statute further provides that every regular full-time municipal police officer "shall be assigned to and shall attend a regional or municipal police training school . . . at such intervals and for such periods of time as the council may determine." *Id.* It appears that, in direct violation of this statute, Officer Vitale never attended a police training school until after the Voutour shooting, a period of over seven years from the date of his appointment as a full-time police officer on the Saugus Police Department. The reason given by the Chief for the failure to follow the statute was that Vitale had received firearms training in the Army and police training as a reserve officer on the Revere Police Department. The statute itself, however, is mandatory in its terms, containing no exceptions. The extent of Vitale's

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training as a reserve officer was not documented, but the statute applies to full-time police officers, not reserves, and there is no evidence that Vitale attended an approved police

training school prior to the shooting. Nor, given the difference in missions between the military and the police, is it clear that Vitale's Army training would be a satisfactory substitute for the statutory requirements. According to his deposition, Vitale's firearms training in the Army was confined to the M 1 and M 14 — both rifles. There is no mention of handgun training. Moreover, it seems likely that police training, in addition to teaching proficiency in the use of handguns, would include training as to the circumstances in which a police officer should not shoot.

The Chief testified in answers to interrogatories that neither Vitale nor Wheeler received any training in the use of firearms. Vitale's testimony was that he owned a .38 Smith and Wesson revolver and that he trained himself in the use of it.

In the record before the district court was a letter from one of the Chief's subordinates detailing three separate incidents of the unjustified use of service revolvers by members of the Saugus Police Department.[6] The letter which

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was written six months prior to the Voutour shooting, contains the following:

> How does one compensate for the lost [*sic*] of a life or limb? It appears that the 1:00 a.m. to 9:00 a.m. early morning division are not getting any competent men (only bodies), as this is the third shooting on division in question with three separate officers on three separate occasions. One of the shooting [*sic*] involved a defendant being shot in the abdomen requiring hospitalization.
>
> It also appears that efforts are becoming futile when it comes to training some officers ragarding [*sic*] the use and handling of their service revolver. Several officers that I have spoken to fear for their

[6] None of these involved Vitale.

> safety as well as the public safety when we employ men such as Officer [name deleted]. I would not like to see this department learn through trial and error after a life or limb has been taken.

We think the foregoing indicated a triable issue concerning whether or not the Police Chief had been grossly negligent to the point of conscious indifference with respect to police training, and in particular Vitale's training.[7] Whether the record also reflected a causal connection between the lack of training and Vitale's actions is perhaps closer, but we believe it did. Viewing the facts in a light most

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favorable to plaintiff, it could be inferred that the arrest culminating in Vitale's shooting of Voutour, and the shooting itself, were so mishandled in their various details as to indicate that trained officers would not have acted in this manner.

Also relevant to the issue of causation was the affidavit of James F. Fyfe, a putative expert witness for the plaintiff in police training and procedure, stating, among other things, that the shooting of Voutour was a highly predictable result of the inadequate training received by the Town police officers and particularly Vitale's lack of basic police training. The Fyfe affidavit, if admissible under Fed. R. Civ. P. 56(e), obviously provides additional support for causation. But we need not consider the question of its admissibility since, even without it, we think there was enough evidence from which causation might reasonably be inferred to make summary judgment inappropriate.

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[7] Like Wheeler, Chief Forni raised a qualified good faith immunity defense against Voutour's section 1983 claim. Unlike Wheeler's situation, however, we believe that a wrongful shooting would be the type of result that would be likely to arise — and hence be "known" under *Harlow* — from a failure to train police officers in the proper use of weapons.

Thus viewing the facts in the light most favorable to plaintiff, we think the district court erred in granting summary judgment for the Chief on the issue of adequate police training. At trial, of course, the district court will have the usual opportunity to review the legal sufficiency of the evidence Voutour actually submits. We hold only that under standards applicable to a motion for summary judgment, Voutour was entitled to proceed to trial on this matter. The court,

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therefore, erred in granting summary judgment against the Police Chief on Voutour's section 1983 claim.

Town of Saugus

Since we have sustained the district court's grant of summary judgment to the Police Chief on the part of the claim that he established or permitted a custom of excessive police violence, we also affirm, for the same reasons, the summary judgment for the Town on that part.

With respect to the adequacy of the training given to the defendant officers, much of the same reasoning that caused us to vacate the granting of summary judgment against the Chief leads us to vacate the grant of summary judgment for the Town of Saugus. This does not mean, however, that the Town would be automatically liable if there were a finding that the Chief's failure to properly train Vitale and, to any extent relevant, Wheeler, rose to the standard of gross negligence amounting to conscious indifference. The evidence may demonstrate that the Town was not aware of the Chief's derelictions, assuming these are proven. The Town Manager, in answer to pretrial interrogatories, stated that the Town followed the statutory mandate for police training as a matter of policy. There is nothing in the record to indicate whether the Town knew of the Chief's statutory disregard in Vitale's case. The matter was not pursued by the parties or addressed by the district court at the time the motion for summary

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judgment was under consideration. The Town could only be found liable

if it or the Town Manager[8] knew or should have known that the Chief was not training his police officers properly and then failed to take reasonable measures to rectify the situation. *See Languirand* v. *Hayden*, 717 F.2d at 227-28. *See also Bennett* v. *City of Slidell*, 728 F.2d 762 (5th Cir. 1984) (en banc). Whether or not there is sufficient evidence in the record to create a jury question on this score will be for the district court to determine.

THE EVIDENTIARY RULINGS

Vitale has objected to four areas of testimony which he claims were prejudicial and irrelevant. Since these objections may arise on retrial, we deem it advisable to rule on them now. We note first that any evidence which is harmful to a party is in that sense prejudicial; the question, therefore, is whether "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403.

The first evidentiary area was the admission of testimony to the effect that police officers, other than Vitale and Wheeler, who arrived on the scene after the shooting beat up the passengers in the Voutour automobile. This certainly might have a prejudicial effect on Vitale's case.

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As we read the trial transcript, the probative purpose of the testimony was threefold: to show how certain marks got on the Voutour automobile, an important and disputed factual issue; to explain the testimony of passenger MacDonald on cross-examination that he had testified previously that he would like to get even with the Saugus police; and to show the position of the passengers in the car. Under the circumstances, the district court's ruling that the probative value of the testimony outweighed the danger of unfair prejudice was not, in our view, error. The danger was minimized by the court's instruction at the time the

[8] Under the Town ordinances and bylaws, the Town Manager had the responsibility for the hiring of police officers and had some supervisory authority over the Chief of Police.

evidence was admitted, and repeated in the charge, that the beating of the passengers "has nothing to do with what Mr. Vitale did or did not do in shooting Mr. Voutour."

Secondly, Vitale objects to Voutour's testimony that after the shooting he heard a police officer say: "This is going to be a very hush-hush case." Contrary to the representation in Vitale's brief, it is not clear that this statement was not made by Vitale. Voutour testified that he did not know who any of the police officers were that night, and that the statement was made by the officer who checked his pulse right after the shooting. There was evidence from which the jury could have found that Vitale was the one who checked Voutour's pulse and made the "hush-hush" statement

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to Wheeler. There was no abuse of discretion in admitting the testimony.

Finally, Vitale objects to the testimony of the ambulance attendant that he was not informed by the police that Voutour had been shot. The attendant's testimony was that the police, he did not know which officer, told him that Voutour was a motor vehicle accident victim and it was not until Voutour was examined at the hospital that he learned that Voutour had been shot. This testimony was admissible to impeach Vitale's testimony that he had told the ambulance driver and the attendant that Voutour had been shot.

THE REQUESTED JURY INSTRUCTIONS

For the sake of completeness, and to forestall this objection arising upon retrial, we address the plaintiff's claim that the district court erred in failing to explicitly instruct the jury that the defendant had no more right under Massachusetts law than an ordinary citizen to use deadly force. It appears to be an accurate proposition that the law of Massachusetts does not grant police officers any more right than an ordinary citizen to shoot someone to protect a third person. It is our opinion, however, that an instruction to this effect would be, at best, irrelevant and, at worst, misleading.

The district court instructed the jury that the crucial question in plaintiff's section 1983 claim was whether

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the defendant's use of force was unreasonable and excessive. In not allowing an independent good faith defense to the section 1983 action, the district court implicitly recognized that Officer Vitale in his official capacity had no special privilege or entitlement to shoot the plaintiff. The district court informed the jury that the police privilege to use deadly force to arrest a felon was not in issue. She instructed the jury to take into account all circumstances in determining whether Officer Vitale's use of deadly force to protect his partner was unreasonable and excessive. The jury was asked to consider the fact that Vitale was a senior officer in a patrol car and Wheeler was a reserve officer, to consider whether Wheeler's life was in fact in danger, whether Wheeler would have been entitled to use force for himself, and whether a reasonable person in the position of Vitale would have thought force necessary to protect Wheeler. This instruction is consistent with the law of Massachusetts.

While the issue of a police officer's use of force for the purpose of protecting a third person has not been directly discussed by the Massachusetts Supreme Judicial Court, its treatment of a police officer's use of deadly force to effect an arrest indicates that no distinction would be drawn between a police officer's use of deadly force to protect and a private citizen's use of deadly force to protect. In *Julian* v. *Randazzo*, 403 N.E.2d 931 (1980), a police officer's

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use of deadly force to effect an arrest was found to be limited in the same way a private citizen's use of such force to effect an arrest would be limited. *Id.* at 934. Where the Massachusetts courts have considered the use of deadly force by a private citizen to protect a third person, they have adopted a reasonableness standard. *Commonwealth* v. *Martin*, 341 N.E.2d 885, 891 (1936).

This standard, however, "may depend in part upon the relationship of the persons involved." *Id.* Consequently, Vitale's official status as a police officer, while giving him no special rights, remained an important consideration in the jury's assessment of the events. The issue of whether the defendant acted reasonably is not at all dependent upon any equality of rights between police officers and private citizens, but rather upon a determination of whether the defendant's use of force was excessive *in the circumstances*. In the circumstances, Vitale was a police officer and Wheeler was his partner. Vitale's status as a police officer cannot be eliminated from the circumstances, nor should it be. The standard of reasonableness relates back to what is reasonable conduct for a person in the actor's position. That police officers and other citizens have equal rights to use discretion in protecting one another and equal rights to use their own judgment and act accordingly is not relevant to a standard of reasonableness which is dependent upon all the variables

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present in the situation. The analysis involved must go deeper than the presumed equality of rights and the instruction requested was properly rejected.

SUMMARY

So much of the judgment as awarded damages to Voutour against Vitale on the claim under Massachusetts law for assault and battery is vacated. The part of the judgment dismissing Voutour's section 1983 claim against Vitale is also vacated. Both claims are remanded for a new trial.

The summary judgment in favor of Wheeler on the section 1983 claim against him is affirmed.

The summary judgments in favor of the Chief of Police and Town of Saugus on Voutour's section 1983 claims against them based on the contention that they established a policy or custom of using excessive force are affirmed.

The summary judgments in favor of the Chief of Police and Town of Saugus on Voutour's claims against them under sec-

tion 1983 alleging their responsibility for inadequate police training are vacated, and these claims are remanded for further proceedings not inconsistent herewith.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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BOWNES, *Circuit Judge* (concurring). I concur in the result of the per curiam opinion, but write specially to express my disagreement with two aspects of the analysis found therein. First, I believe there is no need to rely upon tort concepts of negligence or gross negligence to determine whether liability will attach under § 1983. When the per curiam opinion uses this tort language, it is not really discussing the presence of tort negligence or gross negligence, but simply the issue of foreseeability of consequences. Foreseeability as a factor of § 1983 liability is different than foreseeability as a factor of tort liability. Negligence and gross negligence are defined by reference to common law concepts of duty of care; foreseeability under § 1983 is defined by reference to constitutional and statutory standards which a reasonable government official can be expected to know, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-19 (1982). As a result, conduct which may be viewed as grossly negligent is not necessarily conduct for which liability may attach under § 1983. The per curiam opinion appears to recognize this in its analysis of the claim against Officer Wheeler; although Officer Wheeler's conduct might sustain a jury finding of gross negligence, it could not sustain a jury finding of liability under § 1983 because the *constitutional* repercussions of his conduct were not sufficiently foreseeable. Given this divergence and the different focuses of tort law and § 1983, I think it would be both more accurate and less confusing to avoid the language of tort law in determining liability under § 1983. Thus the analysis of the claim against Chief

Forni, while it is couched in terms of gross negligence, could be quite

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easily recast along the lines of the analysis of the claim against Officer Wheeler: whether the constitutional repercussions of his conduct were sufficiently foreseeable to justify holding him liable under § 1983.

My second objection to the analysis found in the per curiam opinion stems from the requirement that a finding of gross negligence as opposed to simple negligence is necessary for supervisory liability. Leaving aside my objections to the use of these tort concepts, what this results in is a requirement that the likelihood or foreseeability of constitutional repercussions be very high before liability attaches under § 1983. While I recognize the per curiam opinion follows the vast majority of courts in requiring a level of foreseeability comparable to that required for a finding of gross negligence, I find little justification for this. The Supreme Court has never directly addressed this issue and I do not believe that such a high standard can be inferred from its other § 1983 decisions. In particular, I do not read either *Rizzo* v. *Goode*, 423 U.S. 362 (1976), or *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), to foreclose a lower standard of foreseeability — one comparable to simple negligence. Neither the *Rizzo* requirement of an "affirmative link" between the constitutional deprivation and the challenged conduct, 423 U.S. at 671, nor the *Monell* requirement that official policy be the "moving force of the constitutional violation," 436 U.S. at 694, speak to more than the requirement that there be an affirmatively shown causal connection between the challenged conduct and the constitutional deprivation. In *Monell*, the Court

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characterized *Rizzo* as having rejected *respondeat superior* as a basis for § 1983 liability, thereby rejecting vicarious liability based on considerations of public policy rather than fault or causation.

I suggest that the "objective reasonableness" standard of qualified immunity set out in *Harlow*, 457 U.S. at 818, requires a test of "objective foreseeability" which is lower than the one imposed by the gross negligence standard. If the knowledge expected of government officials is that which a reasonable person could be expected to have, the foresight expected of government officials should be the same — that of a reasonable person. As a practical matter, this lower standard would have no effect on the results in this case.

There is one final point which needs to be addressed. In a footnote discussing the possible application of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), to deprivations of life or liberty, the per curiam opinion states that it might be reasonable to hold that state negligence remedies afford sufficient process for negligent deprivations of life or liberty. I do not believe that *Parratt* should be extended beyond deprivations of property. *See Parratt*, 451 U.S. at 545 (Blackmun, J., concurring); *Hudson* v. *Palmer*, 52 U.S.L.W. 5052, 5058 n.4 (U.S. July 3, 1984) (Stevens, J., concurring in part and dissenting in part). Life and liberty interests are such that due process cannot be satisfied procedurally by the provision of post-deprivation remedies. At some point, "procedural due process shades into substantive due process, and *Parratt* becomes

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inapplicable." *Thibodeaux* v. *Bordelon*, 740 F.2d 329, 338-39 n.9 (5th Cir. 1984).

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1159.

JAMES T. VOUTOUR,
Plaintiff, Appellee,
v.
HAROLD VITALE,
Defendant, Appellant.

No. 84-1214.

JAMES T. VOUTOUR,
Plaintiff, Appellant,
v.
HAROLD VITALE, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: March 29, 1985

These causes came on to be heard on appeal from the United States District Court for the District of MASSACHUSETTS, and was argued by Counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The verdict of the jury is set aside, the judgment of the district court on the jury verdict is vacated. The summary judgment in favor of Wheeler on the section 1983 claim against him is affirmed. The summary

judgments in favor of the Chief of Police and Town of Saugus on Voutour's section 1983 claims against them based on the contention that they established a policy or custom of using excessive force are affirmed. The summary judgments in favor of the Chief of Police and Town of Saugus on Voutour's claims against them under section 1983 alleging their responsibility for inadequate police training are vacated. The causes are remanded to the District Court for further proceedings consistent with the opinion filed this day. No Costs.

By the Court:
/s/ Francis P. Scigliano
Clerk.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1159

JAMES T. VOUTOUR,
Plaintiff, Appellee,
v.
HAROLD VITALE, ET AL.,
Defendants, Appellants.

No. 84-1214

JAMES T. VOUTOUR,
Plaintiff, Appellant,
v.
HAROLD VITALE, ET AL.,
Defendants, Appellees.

Before
Campbell, *Chief Judge*,
Bownes, *Circuit Judge*,
and Perez-Gimenez,* *District Judge*.

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* Of the District of Puerto Rico, sitting by designation.

MEMORANDUM AND ORDER

Entered May 8, 1985

While the petition for rehearing correctly points out several lapses in the statement of facts in our opinion, which we correct below, we do not find, after careful review, that these affect or should affect our determination that the issues of the possible liability of Chief Forni and the Town of Saugus should *not* be resolved on a motion for summary judgment. Viewing the facts most favorably for plaintiff, we think a sufficient showing was made of genuine issues of material fact concerning whether or not the Chief and Town are liable under 42 U.S.C. § 1983 for having violated the plaintiff's constitutional rights.

Our determination in this regard does not, as stated on page 27 of our opinion, foreclose defendants' right at the close of evidence to seek the district court's review of the sufficiency of the evidence by motion for a directed verdict.[1] By then, especially after examination and cross-examination of witnesses, *see* C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2532 (1971), the parties may well have presented a far more complete and meaningful picture of what training Vitale had received and what the Chief and Town of Saugus knew or had reason to know. The district court will be able to determine, as a matter of law, whether a jury has a sufficient basis on that record for finding that the Chief was grossly negligent to the point of conscious indifference with respect to Vitale's training, and also whether there is sufficient evi-

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[1] In respect to the Town of Saugus we also emphasized in our opinion the need to prove not only that the Chief had been grossly negligent to the point of conscious indifference with respect to training Vitale, but that the Town, through its Town Manager or otherwise, knew or should have known of the Chief's dereliction. *See* pages 28-29. This issue may be pursued on remand by summary judgment procedures as well as at trial.

dence to support a verdict against the Town of Saugus. *See* pages 28-29. Our present ruling should not be understood as necessarily prejudging such a motion.

We must mention a further point. On January 8, 1985 the Supreme Court heard argument in *Oklahoma City* v. *Tuttle*, No. 83-1919, 53 U.S.L.W. 5300. The Court's decision in that case could be highly significant with respect to the claim against the Town of Saugus, since the issue before the Court involves determination of the circumstances in which a municipality is liable for misconduct of a police officer. *Tuttle* could also shed some further light on the law pertaining to the claim against Chief Forni. Needless to say, when this case goes back to the district court, this circuit's directions in the current opinion must yield to any rulings the Supreme Court may by then make in *Tuttle* or elsewhere. To the extent the Supreme Court in *Tuttle* lays down principles that differ from any of our present rulings, the district court on remand may and should apply its best understanding of the Court's decision without further application to us.

Our opinion is amended as follows:

(1) On page 24, delete lines 2-20 and replace with the following:

> state law by failing to provide Vitale, with required police training.
>
> At the time of the facts Massachusetts law required,
>
> > *Every person* who receives an appointment as a regular police officer on a permanent full-time basis in any city or in any town, . . . *shall, within nine months of the date of his appointment,* be assigned to and shall attend a police training school approved by the Massachusetts police training council for a course of study lasting at least six weeks and shall satisfactorily complete such course . . . .

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1159.

JAMES T. VOUTOUR,
Plaintiff, Appellee,
v.
HAROLD VITALE,
Defendant, Appellant.

No. 84-1214.

JAMES T. VOUTOUR,
Plaintiff, Appellant,
v.
HAROLD VITALE, ET AL.,
Defendants, Appellees.

Before

CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER AND TORRUELLA,
Circuit Judges.

ORDER OF COURT

Entered: May 9, 1985

The panel of judges that rendered the decision in these cases having denied the petition for rehearing submitted by appellees, Town of Saugus and Fred Forni and their suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be hereby denied.

By the Court:

/s/_____

Clerk.

Appendix E.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 79-2387-Z

JAMES T. VOUTOUR
vs.
HAROLD VITALE, et al.

MEMORANDUM OF DECISION

ZOBEL, D.J.

Plaintiff Voutour brings this action under 42 U.S.C. § 1983 alleging that his constitutional rights have been violated by Harold Vitale and Howard Wheeler, two officers employed by the Saugus Police Department. Plaintiff names also as defendants the Town of Saugus and the Town's former Chief of Police, Fred Forni. Specifically, plaintiff charges that he was intentionally and unjustifiably shot by Officer Vitale and that Officer Wheeler played an important role in his shooting. The plaintiff also claims that the Town and Chief Forni violated his rights by condoning, encouraging and acquiescing in prior violent acts committed by Officer Vitale, by failing to discharge their duty to train officers in the responsible use of firearms and by encouraging the commission of violent acts in general by officers on the police force. All defendants have moved for summary judgment.

Motion of Defendant Vitale.

Defendant Vitale's motion for summary judgment is denied. There is a genuine dispute as to the material facts surrounding

actions which occurred just prior to the shooting. Vitale claims that he shot at plaintiff's car because the vehicle was accelerating and endangering the life of his partner, defendant Wheeler, who had slipped, had grasped the car door handle and was being dragged by the car and about to fall under its wheels. When the Court views the facts in the light most favorable to the plaintiff, however, it appears that Vitale unjustifiably shot the plaintiff after the car had slowed and as the plaintiff was stepping onto the ground. Such discrepencies between sworn versions of the facts cannot be resolved on summary judgment.

Motions of Defendants Saugus and Forni.

In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) the Supreme Court held that local governing bodies may be sued under § 1983 when the action which deprives a plaintiff of constitutional rights "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." Absent an explicit policy statement or regulation, local governments may still be sued "for constitutional deprivations visited pursuant to governmental "custom."" 436 U.S. at 690-1

In addition to showing that he was deprived of a constitutional right without due process of law, plaintiff must satisfy two prerequisites to liability. He must show that the defendant's actions were intentionally injurious or grossly negligent, and that defendant's conduct was a proximate cause of plaintiff's injuries. Although several circuits have held that merely negligent acts may constitute § 1983 violations,[1] the majority view is that acts must be grossly negligent before they rise to the level of a constitutional violation. *Owens v. Haas*, 601 F.2d

[1] *See Smith v. Hill*, 510 F.Supp. 767 (D. Utah, 1981) (collecting cases).

1242, 1246 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979); *Bonner v. Coughlin*, 545 F.2d 565, 567-9 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932 (1978); *Smith v. Hill*, 510 F.Supp. 767, 772-3 (D. Utah, 1981) (collecting cases); *Leite v. City of Providence*, 463 F.Supp. 585, 588-91 (D.R.I. 1978). The Court of Appeals in this circuit has held that, at least where the provision of medical care to prisoners is concerned, "[m]ere negligence, in the absence of conduct which shocks the conscience," is not actionable under § 1983. *Page v. Sharpe*, 487 F.2d 567, 569 (1973). Although the holding in *Page* may not extend to this case and the degree of culpability required may depend on the nature of the constitutional right alleged to have been violated, *see Baker v. McCullan*, 443 U.S. 137, 139-40 (1979), I am persuaded that gross negligence is a prerequisite to a finding of liability under § 1983 in this case. The majority position comports with the Civil Rights Act's prophylactic purpose of deterring the *abuse* of official power, *Smith v. Hill*, 510 F.Supp. at 772, and with the Supreme Court's declaration that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Even when all inferences are drawn in favor of the plaintiff, the affidavits filed in opposition to the motion for summary judgment do not establish that defendants Forni and the Town of Saugus intentionally deprived plaintiff of any rights or were grossly negligent in training police officers in the responsible use of firearms or in responding to complaints regarding improper police conduct. The Department promulgated a policy prohibiting the discharge of firearms except during target practice or in extremely exigent circumstances. This policy was communicated to defendant Vitale.[2] Moreover, it is undisputed

[2] Plaintiff has moved to strike as hearsay portions of an affidavit submitted by defendant Forni in support of the motions for summary judgment. These

that officers were discharged as a result of both investigations into the use of firearms by police which were conducted upon the receipt of complaints during the four years prior to the shooting of the plaintiff. Plaintiff has adduced no evidence to show a pattern of violent police behavior which might support an inference that the Chief of Police supported or acquiesced in such behavior. *Compare Black v. Stephens*, 662 F.2d 181 (3rd Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1646 (1982); *Herrerra v. Valentine*, 653 F.2d 1220 (8th Cir. 1981); *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979).

Insofar as plaintiff asserts a pattern of violent activity on the part of officer Vitale, the evidence of only one prior complaint against the officer is insufficient as a matter of law, particularly in light of the undisputed fact that that complaint involved neither the infliction of serious injury nor the use of a firearm. No reasonable inference could be drawn that this incident, involving the restraining of a patron at a crowded restaurant, should have put Forni or Saugus on notice that Vitale was irresponsible in his use of firearms.

The only act of defendants Forni or Saugus which might possibly amount to gross negligence is their failure to send Officer Vitale to a police training school within nine months of his appointment, as was then required by Mass.Gen.Laws ch. 41 § 96B. Vitale became a reserve officer in 1973 and a regular officer in 1975 but did not attend a training course until

---

portions deal with whether Forni provided the policy on firearms to all members of the police force. The Court need not rule on this motion because Vitale has stated in his affidavit of August 6, 1982 that he received a copy of the policy. That other members of the force may or may not have received copies is irrelevant to the question of whether there was any gross negligence on defendants' part which proximately caused plaintiff's injuries.

Plaintiff has also moved to strike portions of Forni's affidavit dealing with target practice. The Court need not rule on this part of the motion, either, since Officer Forni's accuracy as a marksman is not, as plaintiff admits in his Memorandum in Opposition to Defendants' Motions, an issue in this case.

after the 1977 shooting. A jury might be jusjtified in finding that this was the sort of "indifference to present legal duty and . . . utter forgetfulness of legal obligations so far as other people may be affected" which constitutes gross negligence under Massachusetts law. *Altman* v. *Aronson*, 231 Mass. 588, 591, 121 N.E. 505, 506, *cited in Boston & Maine Railroad v. Aetna Casualty and Surety Co.* 329 F.2d 602, 605 (1st Cir. 1964). Even if this is so, however, summary judgment for these defendants is still warranted because the affidavits in no way support the inference that such negligence was the "moving force" behind or even a proximate cause of plaintiff's injury. *Polk County v. Dodson*, ____ U.S. ____, 102 S.Ct. 445, 454 (1981).

Motion of Defendant Wheeler.

Defendant Wheeler's motion is also granted. Viewing the facts in the light most favorable to the plaintiff, Officer Wheeler silently approached plaintiff's car from behind, drew his gun and did not identify himself as a police officer. While Wheeler's actions might be viewed as having proximately caused plaintiff's injury, as a matter of law the affidavits do not support the conclusion that Wheeler's acts were so careless and reckless as to show the utter indifference to resulting consequences upon which a finding of gross negligence can be predicated.[3]

---

[3]Defendants have moved to strike the affidavit submitted in opposition to defendants' motions by James Fyfe, an apparent expert on police practices. Since the Court has determined that summary judgment is proper for defendants Forni, Town of Saugus and Wheeler, it is unnecessary to rule on their motions to strike. It is also unnecessary for the Court to rule on defendant Vitale's motion to strike since even without Fyfe's affidavit the documents filed reveal a genuine dispute about material issues of fact concerning the events immediately preceding the shooting of the plaintiff.

CONCLUSION

For the reasons stated above, the motion of defendant Vitale for summary judgment is denied. The motions of defendants Forni, Town of Saugus and Wheeler are allowed.

November 7, 1982
DATE

/s/ Rya W. Zobel
DISTRICT JUDGE

Appendix F.

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT MASSACHUSETTS

CASE TITLE	DOCKET NUMBER
JAMES T. VOUTOUR	CA 79-2387-Z
V.	NAME OF JUDGE OR MAGISTRATE
HAROLD VITALE, ET AL	RYA W. ZOBEL

☒ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

In accordance with the jury verdict and that judgment is entered for the plaintiff James T. Voutour against the defendant Harold Vitale on the state claim in the amount of $1,100,000, plus interest at 12% from November 30, 1979 to the present in the amount of $536,433.32, for a total judgment of $1,636,433.32.

And it is further ordered, in accordance with the memorandum of decision dated November 2, 1982, that judgment is entered for the defendants Howard Wheeler, Fred Forni and Town of Saugus.

Approved as to form:
/s/_____
Rya W. Zobel
UNITED STATES DISTRICT COURT

CLERK
George F. McGrath

DATE
12/23/83

(BY) DEPUTY CLERK
/s/ Nina Singer

Appendix G.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Massachusetts General Laws.

Chapter 41.

(As it was in effect on February 14, 1977.)

Section 96B. Every person who receives an appointment as a regular police officer on a permanent full-time basis in any city or in any town, the metropolitan district commission police, the Massachusetts Bay Transportation Authority police, the capitol police or as an employee of the registry of motor vehicles having police powers shall, within nine months of the date of his appointment, be assigned to and shall attend a police training school approved by the Massachusetts police training council for a course of study lasting at least six weeks and shall satisfactorily complete such course. Any such police officer attending such school shall be paid his wages as police

officer. He shall also receive such reasonable expenses as may be determined by the appointing authority. Any such police officer who through his own fault fails to complete his course of study satisfactorily shall be removed from the police force by the appointing authority.

Every regular police officer on a permanent full-time basis in any such city or town, the metropolitan district commission police, the Massachusetts Bay Transportation Authority police, the capitol police or an employee of the registry of motor vehicles having police powers shall be assigned to and shall attend a police training school approved by the Massachusetts police training council for the purpose of completing an approved course of study of in-service training at such intervals and for such periods of time as the council may determine. Any such police officer who receives an appointment to a position of higher rank shall, in addition, complete such other courses of supervisory training as the council may determine. While attending such school or completing such courses, such person shall be paid his regular wages as a police officer and shall receive such reasonable expenses as may be determined by the appointing authority.

Approved July 13, 1972.

Supreme Court, U.S.
FILED
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-210

In The
Supreme Court of the United States
October Term, 1985

TOWN OF SAUGUS AND FRED FORNI,
Petitioners

v.

JAMES T. VOUTOUR,
Respondent

On Petition for Writ of Certiorari to Review
A Judgment of the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

I. May A Municipality And Its Chief of Police Be Held Liable Under § 1983 For Gross Negligence In The Training Of Police Officers, Including, But Not Limited To, The Failure To Comply With a Mandatory State Statute, Where The Evidence Submitted In Opposition To A Motion For Summary Judgment Includes An Expert Opinion That The Gross Negligence In Failing To Train The Police Officers Was A Proximate Cause Of The Plaintiff's Injury?

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On Petition for Writ of Certiorari to Review
A Judgment of the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

STATEMENT OF FACTS

A. The Shooting of Voutour.

According to the petition filed by the Town of Saugus (Saugus) and Fred Forni (Forni) the defendant Harold Vitale (Vitale) shot Voutour in order to stop Voutour's automobile because Vitale's partner, Howard Wheeler (Wheeler) was being dragged along "while the engine of the car was revving at high throttle" (petition, p. 5). In this and other respects the Saugus and Forni have failed to state the facts most favorable to the plaintiff. Accord-

ingly, since the posture of the case arose on defendants' motions for summary judgment it is necessary to state the facts most favorable to Voutour.

As Wheeler was approaching the passenger door of the Voutour vehicle and reaching for the door handle, Voutour pressed down on the accelerator and the car skidded slightly to the right grazing Wheeler (A. 429, 431-433, 444, 483, 484, and 488). Wheeler states that he responded by grabbing the door handle with his right hand and deliberately struck the window (intending to break it but failing) with the flashlight in his left hand (A. 439, 485, and 486). According to Wheeler he then hung on to the door handle with both hands during which time he was dragged approximately 60 feet during a period of 50 to 60 seconds. (A. 490). If this estimate were correct, then Voutour's approximate speed would have been .82 to .88 mph (or less than one mile per hour). On the other hand, Wheeler elsewhere testified that he held on for a period of 15 to 20-25 seconds (A. 487). If he was holding on for 15 seconds, the speed of the vehicle for a 60 foot distance would have been 3.5 mph (see also A. 602-604).

According to Wheeler the "tires were spinning, very rapid, RPM's making a real loud noise." (A. 487). At the probable cause hearing[1] Vitale testified, "I heard

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[1] There was a probable cause hearing on October 27 and 28, 1977 concerning various criminal charges brought against Voutour (A. 373, n.2). Voutour was subsequently indicted for assault and battery with a dangerous weapon (his car) on officer Wheeler, refusing to stop for a police officer, and a one-way street violation. The first criminal trial ended in a mistrial; the second with a plea of guilty for failure to stop when signaled at the Gibbs parking lot and the one-way street violation, and payment of the minimum statutory fines totaling $30.00. The felony charge was dismissed (A. 373, n.2; also see A. 427, and 429-494).

Officer Wheeler yell to me, 'Harry get me off . . . [the] motor was racing, it was at a very high RPM. It sounded like it was at a full throttle and the wheels were spinning hard enough, causing a sirening effect noise" (A. 455 and 446). Wheeler stated that he let go "as soon as the high pitch of the tires slowed down." (A. 430).[2]

When Voutour put his car in "park" on Long Place, he again saw the same vehicle drive around onto Long Place and park directly behind him (A. 520; also see A. 535).[3] Voutour states, "I got angry because I got out of the way of someone who was still behind me. . . . I just

---

[2] When the wheels stopped spinning is a matter of dispute. According to Vitale the vehicle did not stop accelerating until after he fired the shot. (A. 86). When asked how Voutour could have opened the door after he received such a disabling injury, Vitale gave the following incredible testimony at the probable cause hearing:

> "I feel that after I shot him the nerves in his body were there long enough for a snap reaction to open the door." (!)

(A. 450). Not only is this account disputed by Voutour but James Fyfe, the plaintiff's expert, pointed out that the left interior door handle of the Voutour vehicle cannot be opened with "a single upward movement as is true of most automobile interior door handles. Instead, to open the door of Mr. Voutour's automobile from the inside, one must pull a spring-loaded handle upward and toward the interior of the car. Having done this, one must then exert upward pressure on the handle to disengage the lock." (A. 586).

[3] Voutour stated: "I believed it was anybody but a police cruiser. If it was a police cruiser there would have been a light or siren." (A. 522).

wanted to get out of there, go to my friend's house. So I put the car in drive and started to leave. And when I started to leave, there was a thump on the car. . . ." (A. 521).

Thereafter he never heard anything from outside the car (A. 526, 527, and 534). The motor vehicle was not swinging while it traveled on Long Place "because the road was rutted from past travel and from traffic on the road. There were tire ruts and the vehicle tended to follow the ruts" (A. 447). The parties were in agreement that the wheels were spinning; the tires were bald and Voutour did not have snow tires on the vehicle (A. 429 and 523).

After the "thump" on the passenger side there was a period of time which lasted "maybe a second, or not even that" before MacDonald, sitting in the front seat, passenger side, recognized that the person outside the vehicle was a police officer and he thereupon yelled out "It's the police! Stop!" (A. 521). (Dionne also shouted for Voutour to stop (A. 521).) Voutour hearing this immediately took his foot off the accelerator and began pumping the brake (A. 521). The factfinder may infer from this testimony that the sound of the spinning tires, which was like a "screaming noise", according to Wheeler (A. 429; also see A. 445, 446 and 487), died down. The court may also infer from the affidavits of James W. Voutour (Voutour's father), Mercaldi, and Finan, that Vitale saw the brake lights go on since they were in proper working condition after the shooting (A. 557-562).

Voutour then states:

> . . . as I was pumping the brakes to stop the car, the car was having difficulty stopping where the road

> was icy and slushy. The brake fluid was lower earlier, and I thought I was leaking brake fluid. I opened the door and put my left foot out. I was pumping the brakes with my right foot and was getting ready to put the car into park.

(A. 521 and 522).[4]

At that point, as his body was turned and the vehicle was slowing down, he was shot and fell out of the car (A. 524). According to MacDonald, "he opened the door and I guess he was getting out because we were almost at a dead stop before he got shot." (A. 458 and 459). Thereafter MacDonald, as the car was slowly rolling forward, placed the vehicle into "park" and it came to a complete halt (A. 492 and 493).

ment in June, 1963, seven departmental citations, promoliberation:

> I took a stable stance, squatted position as I have been trained to do for accurate shot, picked the shoulder area of the operator of the vehicle, took an aim, and I fired a shot into the shoulder area.

(A. 491).

Voutour was struck on the left side of his neck and immediately fell out of the car door: "The car almost ran over my leg. I tried to move my leg and I couldn't." (A. 469). As officer Vitale approached Voutour, he attempted to move his hand since he thought the officer would step on it and was unable to do so (A. 470). The officer "put his hand on my throat, checked my pulse and

---

[4] Elsewhere Voutour testified that the car ". . . was almost at stop. . . I had the door open. I had my leg out. The next thing I was going to do was put the car in park and get out." The car ha dtraveled "three car lengths maybe" while Voutour had his foot on the accelerator (A. 524).

as he left he said to another police officer, 'this is going to be a very hush, hush case. . . .'" (A. 470, 471 and 528).

According to officer Vitale, immediately after the shooting, he went to Voutour and "I gave him my finger and asked him to squeeze it, but I got no response at all from him" (A. 448 and 449). Voutour never lost consciousness (A. 529). The court may infer from Voutour's physical condition when he was on the ground that he had been paralyzed as of the moment he was shot and thus, contrary to Vitale's story, the vehicle was slowing down with the driver's door open at the time Voutour was shot.[5]

After the shooting of Voutour, MacDonald was slammed up against the car, beaten, thrown down on the ground and kicked; he was hospitalized for three days as a result of his beating (A. 456, 457, and 460). No Saugus police officer was ever disciplined or even reprimanded for any action taken on February 14, 1977.

B. Training of Saugus Police Officers

1. In order to assist him in evaluating this aspect of the case, Voutour retained a nationally recognized expert on police procedures and practices, Fyfe (A. 341-

---

5 See also Exhibit "D" to Plaintiff's Answers to Interrogatories wherein Dr. Murrary Freed states: "It is my opinion to a reasonable degree of medical certainty, that Mr. Voutour was rendered immediately quadriplegic as a result of the shooting and I can determine no way by which he could have opened the motor vehicle after the shooting" (A. 369).

360).[6] Fyfe's work experience included being hired as a Police Academy recruit by the New York Police Department in June, 1963, seven departmental citations, promotion to Sergeant, Patrol Sergeant, and finally Lieutenant, in November, 1977 (A. 351 and 352). His educational background included a B.S. in Criminal Justice at the John Jay College of Criminal Justice, an M.A. in Criminal Justice at the State University of New York (1972), and a Ph.D. in Criminal Justice, State University at Albany (1978) (dissertation: "Shots Fired: An Examination of New York City Police Firearms Discharges") (A. 350). Furthermore Fyfe has been Associate Professor at the American University School of Justice in Washington, D.C., as well as a Senior Fellow at the Police Foundation in Washington, D.C. (A. 350). In addition, Fyfe has authored numerous articles involving the use of deadly force and has lectured extensively on that topic and related topics (A. 354-359). Finally, Fyfe was retained as an expert by the United States Department of Justice in 1979-1980 to analyze the police use of deadly force in Philadelphia, 1975-1978, and he has been retained as an expert in matters of police procedures and practices on numerous other occasions (A. 353 and 354).

---

6 In their petition Saugus and Forni repeatedly refer to Fyfe as a "purported expert" (petition, see, for example, p. 6, n. 6). Voutour confesses to be somewhat puzzled by this description. Fyfe was accepted as an expert witness in the trial before the district court and this court recently cited an article by Fyfe entitled "Observations on Deadly Force" 27 Crime and Delinquency, 376, 378-381 (1981) as authority for the proposition that there is no empirical evidence that the meaningful threat of deadly force leads to the arrest of more live suspects by discouraging escape attempts. *Tennessee v. Garner*, — U.S. —, 105 S. Ct. 1694, 1701, n.10 (1985).

At both the hearing on the motions for summary judgment (A. 847-850), and in his motion for partial reconsideration (A. 879-883), Voutour brought Fyfe's qualifications to the attention of the district court. On neither occasion did the defendants question Fyfe's qualifications as an expert on police procedures and practices (A. 826-845, 865-871, and 884-888). Indeed the district court subsequently permitted Fyfe to testify as an expert as to proper police practices in the trial involving Vitale (A. 1043-1072; see especially A. 1052, 1054, 1059, 1061, 1063, 1066 and 1072).

The Fyfe affidavit extensively discusses the position of Saugus that it sent its officers to training academies and conducted in-service training for its police officers.[7]

---

[7] The significance of the in-service training programs may be evaluated in part by looking at the amounts requested by the Chief and approved by the budgets for this matter:

In-Service Training:

Budget Year:	1973	1974/75	75/76	76/77
Requested/ Approved & Expended:	$750/ 692	$700/ 565	$700/?	$700/?

(1973 Budget covered 18 month period) (A. 566-569; also see A. 422). Also see Forni's deposition in which he complained that while he would recommend budgets "the Town Manager could either cut something out, from there it went to the Board of Selectmen, who did the same thing. . . ." (A. 546), and "funding was cut back many times" (A. 548). Furthermore, Chief Forni (and his command staff) complained "that in-service training at roll call for 30 minutes is not adequate or effective. . . . It is my recommendation that funds be made available for a minimum of 2 week per man year in addition to payment for training personnel be made available" (A. 570). In its petition Saugus and

(Continued on next page)

In particular Fyfe pointed out that notwithstanding the mandate of G.L. c. 41, § 96B that police officers receive specified training within nine months of their appointment, Vitale did not receive his training until some seven years after his appointment as a regular police officer (A. 662). As for the in-service training program, in addition to Fyfe's analysis (A. 659-673), it is worth reviewing the testimony of Wheeler wherein he stated:

> Q. . . . did you receive any training as police officer before you went to the Saugus force?
>
> A. Before, no.
>
> Q. And did you receive any on-the-job training up to the time of this incident? [The shooting of Voutour.]
>
> A. Yes, sir. They usually try to put you with the senior officer.
>
> Q. Your training was on-the-job training at that time?

(Continued from previous page)

Forni claim that "The plaintiff has adduced no evidence whatsoever that Forni's request for additional funds was not promptly acceded to by the Town; indeed, the record demonstrates that in the period prior to Voutour's injury in-service was conducted in full hour sessions, not the 30 minute sessions described by Forni in the undated proposal." (petition, p. 23, n.12). This is only one instance in which the Town and Forni make a statement of fact without a record reference. In addition, with respect to additional funds, it is the defendant's burden on a motion for summary judgment to demonstrate that there exists no genuine issue of material fact as to whether the request for additional funds was acceded to by the Town. The defendants failed to meet this burden. Furthermore, the factfinder could infer from the budgets before the court for the years 1973-1977 that for that period of time additional funds were not provided. (Supplementary Appendix 7-31).

A. Yes.

Q. Up to the point of this incident?

A. Yes.

(A. 422-423).

The "senior officer" with whom Wheeler was put on the night of the shooting was Vitale, who himself had not received training mandated by G.L. c. 41, § 96B. Saugus also relied upon Vitale's "firearm proficiency" which he had obtained through membership in hunting clubs and the National Rifle Association prior to being employed by Saugus (A. 271). This misapprehended the claim. Voutour does not allege that Vitale cannot shoot straight, but rather that he was never provided with training as to when to shoot and when not to shoot, or, if he were, it was done in a grossly negligent or otherwise culpable fashion. Given the claim made by Voutour, much of what Saugus and Forni said about Vitale's knowledge of firearms is simply irrelevant. As the Fyfe affidavit explained in great detail, the prior training or experience Vitale received concerning firearms was totally inadequate to his duties as a Saugus police officer (A. 659-673).

The description by Saugus of training allegedly provided to its police officers is almost wholly in conclusory language. Thus Forni states in his affidavit that officers were given "considerable firearms training". (A. 90). In their petition Saugus and Forni refer to "extensive training", "substantial firearms training", and "considerable informal training" (petition, p. 6). The answers to interrogatories, however, acknowledge that "no formal examinations were given" in connection with firearm training (A. 106). A jury would not be compelled

to accept Saugus' conclusory description of its in-service training and could believe Fyfe's opinion that it was reckless and grossly inadequate (A. 668-670).

Saugus also states that "most importantly, each officer was informed of, and required to follow, the written firearms policy of the Saugus Police Department (A. 91)." (petition, p. 7). The record contains, however, evidence from which a contrary inference could be drawn. Thus at the deposition of Capt. Maillet he testified that he was ordered by Chief Forni to provide each police officer on the 1 a.m. to 9 a.m. division with a copy of the May 7, 1975 "Policy Procedure governing the use of Firearms" and he testified "I am not sure if everybody did [initial the sheet indicating that they had read and received the policy]. I don't know if I got everybody or not" (A. 421, n.29). When this testimony was provided on April 16, 1982, counsel for Saugus and Forni expressly represented that a copy of the sheet referred to by Capt. Maillet would be produced. As a precautionary measure, Voutour on May 5, 1982 filed a request for production of the document (A. 5) and when it was provided on June 7, 1982 (A. 6) it plainly indicated that neither Vitale nor Wheeler had received the May 7, 1975 policy (A. 682 and 685; also see A. 6, 668, 669, 691, and 714-716). The document expressly stated:

"ALL OFFICERS READ AND INITIAL". (A. 685)

No initials appear next to Vitale's and Wheeler's names and a jury could infer from the testimony of Capt. Maillet and this document that they did not receive the May 7, 1975 policy notwithstanding a contrary affidavit in the record.

———o———

ARGUMENT

I. Certiorari Should Be Denied Because This Case Is At An Interlocutory Stage And Not Final And As Such Is Not Ripe For Review.

The case was before the Court of Appeals to review summary judgments granted by the district court. The Court of Appeals reversed the district court on one issue and remanded the case to the district court for further proceedings on that issue. Therefore, this case is not in an ideal posture for review by this Court. The case is at an interlocutory stage and as such is not ripe for review by this Court. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 88 S. Ct. 437, 438 (1967). The normal practice for this Court in such a situation is to deny interlocutory review.

The Court should follow its normal practice in this case. This case is not ripe for review. The record is not complete. The case should be tried first so that the record is complete. The issues argued by Saugus and Forni may become moot or disappear at trial. Also, on remand the district court will have an opportunity to review the admissibility and the legal sufficiency of the evidence actually submitted by the parties. Therefore, this Court should deny certiorari in this case.

II. Certiorari Should Be Denied On The Issue Of Whether An Unconstitutional Municipal Policy Must Be Adopted For Liability Under 42 U.S.C. § 1983.

The Petitioners claim that the Town must have adopted a policy which itself violates the Constitu-

tion in order to be liable under 42 U.S.C. § 1983. Petition at 11-12. This issue should not be addressed by this Court at this time for the reasons set forth in the preceding section. In addition, there is no conflict between the federal courts of appeals on this issue so there is no need for the Court to address it at this time. The Petitioners assert that there is a conflict between the *Voutour* decision and decisions by other federal courts of appeals. Petition at 13-14. Contrary to this assertion, there is no such conflict. The Petitioners cite several federal cases for the proposition that there must be an unconstitutional municipal policy or custom in order to impose liability under 42 U.S.C. § 1983. See Petition at 13-14. None of the cases cited by the Petitioners, however, stand for such a proposition. *See Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) (where established policy of failure to supervise by showing widespread abuse then municipality liable for a deprivation of constitutional rights by conduct pursuant to such policy); *Languirand v. Hayden*, 717 F.2d 220, 227-228 (5th Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 2656 (1984) (municipality liable for failure to train where a pattern of similar incidents or serious incompetence is widespread); *Lenard v. Argento*, 699 F.2d 874, 885 (7th Cir.), *cert. denied;* — U.S. —, 104 S. Ct. 69 (1983) (follows *Hays v. Jefferson County, infra*); *Hayes v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982) (municipality liable for failure to train or supervise where among other things training so reckless or grossly negligent that misconduct almost inevitably or substantially certain to result); *Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir.), *cert. denied*, 449 U.S.

1016 (1980) (liability for failure to act where know of constitutionally offensive acts). None of the above-cited cases required an unconstitutional "policy" to be adopted in order to establish liability.

The Petitioners also incorrectly state that this Court in *Polk County v. Dodson*, 454 U.S. 312 (1981), suggested that a municipal policy or custom must itself be unconstitutional to impose liability under 42 U.S.C. § 1983. *See* Petition at 13. Rather, the plaintiff in *Polk County* alleged that the action of the Offender Advocate's office in failing to represent him on his appeal of a criminal conviction violated his constitutional rights. *Polk County*, 454 U.S. at 314-315. Thus, the case involved a claim that there was an unconstitutional policy which the Court found was not supported and the Court's statements must be read in the context of the case presented.

In addition, the Court should not grant certiorari because it is too early for the Court to address this issue.

The Court should wait to observe how further litigation on the issue proceeds in other courts and to observe the types of situations involved in such cases before deciding this issue.

Furthermore, the Petitioners' position on the issue is incorrect and ignores the legislative history of § 1983. An unconstitutional official municipal policy or custom is not required for liability to be imposed on a municipality under 42 U.S.C. § 1983. 42 U.S.C. § 1983 was enacted because of the failure of certain states to enforce laws. *See Monroe v. Pape*, 365 U.S. 167, 174-176 (1964), *overruled in part on other grounds, Monell v. Department of Social Services*, 436 U.S. 658 (1978). The problem perceived by

Congress in enacting 42 U.S.C. § 1983 was not that municipalities or other governmental entities were adopting "official" policies, rules, or statutes which abrogated the constitutional rights of citizens but rather that there was toleration by officials of unconstitutional conduct.

As the Fifth Circuit Court of Appeals observed:

> The legislative history reveals that the Reconstruction Congress sought to protect constitutional rights and to wipe out Ku Klux Klan violence in the southern states. The debates in Congress occasioned much emotion and rhetorical skill. Waxing eloquent on the failure to protect individuals' constitutional rights, Representative Perry cried, "sheriffs, having eyes to see, see not; judges, having ears to hear, hear not. . . . In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection."

Webster v. City of Houston, 689 F.2d 1220, 1224 (5th Cir. 1982), *on rehearing*, 735 F.2d 838 (5th Cir. 1984) (quoting from Con. Globe, 42d Cong., 1st Sess., 447 (1871)). The Town of Saugus had a duty to undertake adequate procedures to select and train police officers to prevent the misuse of their firearms. By its gross negligence in breaching this duty, Saugus exposed itself to liability for deprivations of constitutional rights "caused" by the policy of failure to adequately train its police officers.

III. Certiorari Should Be Denied On The Issue Of Causation Under 42 U.S.C. § 1983

The Petitioners contend that, upon the evidence before the Court of Appeals on the review of the summary judgments, a jury could not find that any policy of the Peti-

tioners with respect to training "inflicted" Voutour's injury. Petition at 18. The Petitioners seek this Court's review of the evidence which is not a function of this Court. Whether the Petitioners' policy or custom was the moving force behind the deprivation of Voutour's constitutional rights is a question of fact for the jury at trial based upon all the factual evidence and expert opinions. Fyfe, the plaintiff's expert, has submitted his expert opinion that the Town's failure to train was the moving force behind the shooting. (See A. 584, 650, 662, 668).

There is no conflict between the causation requirements under 42 U.S.C. § 1983 as set forth in this Court's decisions in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), *Rizzo v. Goode*, 423 U.S. 362 (1976), and *Oklahoma City v. Tuttle*, — U.S. —, 105 S. Ct. 2427 (1985) and the causation requirements applied by the Court of Appeals in *Voutour*. Under *Monell*, 42 U.S.C. § 1983 imposes liability on a government that, under color of some official policy, "*causes*" an employee to violate another's constitutional rights. *Monell*, 436 U.S. at 692. According to *Rizzo* there must be an *affirmative link* between the unconstitutional deprivation and the municipal policy or custom. *Rizzo*, 423 U.S. at 371. In *Tuttle* the Court in discussing municipal liability continually referred to *causation*. Tuttle, 105 S. Ct. at 2432, 2433, 2436. The *Tuttle* Court declared that a plaintiff must establish that the municipality "*caused* the plaintiff to be subjected" to the deprivation of his constitutional rights. *Id.* at 2432-2433. Liability under 42 U.S.C. § 1983 is imposed for deprivations *caused* by a municipal custom or policy. *Id.* at 2433 (citing *Monell*).

The Court of Appeals decision in *Voutour* was made in light of the Supreme Court decisions in *Monell* and *Rizzo*. *See Voutour*, 761 F.2d at 820. The *Voutour* decision specifically acknowledged *Monell's* requirement that official policy must be "the moving force of the constitutional violation." *Id.* The Court of Appeals decision also cited the *Rizzo* requirement that an affirmative link between the conduct of a supervisor and an employee be shown to impose liability on a supervisory official. *Id.* at 819-820. Thus, the *Voutour* decision was based upon the ability of a jury to find that the municipal policy or custom was the moving force behind the violation of Voutour's constitutional rights in accordance with *Monell* and there is no conflict for this Court to resolve.

Even if the Court of Appeals decision was that the municipal policy or custom could be found to be the "proximate cause" of the deprivation of constitutional rights, there is no substantive difference between the proximate cause standard and the moving force standard. The Petitioners appear to claim that the moving force standard requires more than the proximate cause standard but does not offer any explanation of the difference between them or what more is required. *Monell*, *Rizzo*, and *Tuttle* all speak in terms of causation. *Monell*, 436 U.S. at 691, 692; *Rizzo*, 423 U.S. at 371, *Tuttle*, 105 S. Ct. at 2432, 2433, 2436. The petition submitted by the Petitioners itself speaks in terms of causation. See Petition at 15, 16-17. A definition of proximate cause of an injury is "the primary or *moving cause*, or that which, in a natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury and without which the accident could not have happened." Black's Law Dictionary (5th

ed. 1979) (emphasis supplied). Thus, within the definition of proximate cause is the requirement that the act or custom or policy be the moving cause or moving force. The *Tuttle* Court referred to the need to establish a policy as *a* moving force. *Tuttle* at 2436 at n.7. It did not refer to *the* moving force. *See id.* Thus, moving force is another phrase for proximate causation. There is no stricter criterion which can be imposed.

In addition, the Petitioners have waived their right to raise this issue. In their brief to the Court of Appeals, the Petitioners did not take issue with the District Court's use of the proximate cause standard to evaluate the case. (See Appeal Brief at 20-25; A. 40a.)

IV. Certiorari Should Be Denied Because No Conflict Exists Between The Decision Of The Court Of Appeals And Decisions Of This Court With Regard To The Existence Of A Municipal Policy Or Custom And Liability Under 42 U.S.C. § 1983.

Municipal liability under 42 U.S.C. § 1983 is predicated upon the existence of a municipal policy or custom. The Petitioners claim that there was no evidence of any municipal policy or custom regarding training of police officers upon which § 1983 liability could be based. Petition at 19-20. The Petitioners are actually unhappy with the issues of fact found by the Court of Appeals and are asking this Court to adopt other findings. Fact finding is not a function of this Court. The Petitioners also continue to state the facts most favorable to them which is the incorrect standard under summary judgment. They repeatedly state in their petition that there was no evidence whatsoever upon which to find a municipal policy or custom. See Peti-

tion at 19-24. The Petitioners, however, then refer to evidence cited by the Court of Appeals to support its finding of a triable issue claiming that such evidence does not support the findings of the Court of Appeals. See Petition at 22 n.12. Thus, the Petitioners actually are dissatisfied with the Court of Appeals factual findings.

There is ample evidence to support the Court of Appeals decision. The letter from Captain Maillet regarding the three prior shootings is instructive not only on the issue of the adequacy of disciplinary action but also on the issue of the problem the officers had in deciding when to shoot and when not to shoot and that the Chief and Town were aware of the problem. (See A. 542-545). There are also factual disputes as to the adequacy and effectiveness of the in-service training based upon the proposal by Forni and the analysis made by Fyfe, an expert in the area of police procedures. *Voutour*, 761 F.2d at 821-822. (A. 668-673).[8]

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[8] The Petitioners also claim that the Court of Appeals acknowledged that the plaintiff had adduced no evidence that any omissions in training were even known to Saugus. See Petition at 19. The Court of Appeals acknowledged, however, that the issue of the Town's knowledge of Chief Forni's statutory disregard in Vitale's training was never pursued by the parties or addressed by the district court. *Voutour*, 761 F.2d at 823. The Court of Appeals distinguished the Town from the Chief on its own initiative. The relationship of the parties is a question of fact for a jury. The Court of Appeals did not decide that the Chief's knowledge could not be found to be the knowledge of the Town. Also, in this case, the Town has waived its right to assert that the Chief was not the policymaker for the Town with regard to the training and supervision of the Town's police officers. The Town and Chief Forni have had the same

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The petitioners assert that the Court of Appeals decision is in conflict with this Court's recent decision in *Oklahoma City v. Tuttle*, — U.S. —, 105 S. Ct. 2427 (1985). The *Tuttle* Court held that proof of a single incident of unconstitutional activity was sufficient to impose municipal liability where there was proof that the incident was caused by an existing, unconstitutional municipal policy. *Id.* at 2436. The *Tuttle* Court also held that where the policy relied upon to impose liability is not itself unconstitutional, proof of a single incident will not be enough to establish fault and a causal connection. *Id.*

The Court of Appeals decision is not in conflict with *Tuttle* for several reasons. First, *Tuttle* had not been decided by this Court at the time the Court of Appeals decided *Voutour*. In addressing the petitioners' motion for reconsideration, the Court of Appeals instructed the district court to which the case was remanded that once *Tuttle* was decided by this Court, the district court should abide by *Tuttle*. *See Voutour, supra*, 761 F.2d at 827. The Court of Appeals announced that:

> Needless to say, when this case goes back to the district court, this circuit's directions in the current opinion must yield to any rulings the Supreme Court may by then make in *Tuttle* or elsewhere. To the extent the Supreme Court in *Tuttle* lays down principles that differ from any of our present rulings, the district court on remand may and should apply its best under-

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counsel since the case's inception up to the present time. If the Chief was not the policymaker then there would have been a conflict of interest between the Chief and the Town and they could not have been represented by the same counsel. Neither the Town nor the Chief ever took the position that the Chief's knowledge not not the knowledge of the Town and, therefore, no counter-evidence on that issue was submitted by Voutour.

> standing of the Court's decision without further application to us.

Id. Thus there is no need for this Court to review this case because the district court can handle the case on remand in accordance with *Tuttle* on a full record.

Furthermore, there is no real conflict between this Court's decision in *Tuttle* and the *Voutour* decision. In *Tuttle*, this Court dealt with the question of whether a single isolated incident of unconstitutional activity can show a general pattern evidencing a municipal policy. *Tuttle*, 105 S. Ct. at 2431 n.2. The Petitioners contend that, in *Voutour*, the Court of Appeals inferred a municipal policy or custom from one incident of police misconduct (the Voutour shooting) or one omission in training or supervision. Petition at 21. The Court of Appeals, however, did not rely on the shooting incident alone as establishing a policy. The Court of Appeals also relied on the conscious decision by Chief Forni to violate state law by not sending police officer(s) to police training school as required by state law. The *Tuttle* Court itself acknowledged that "the word 'policy' generally implies a course of action consciously chosen from among various alternatives; . . . ." *Tuttle*, 105 S. Ct. at 2436. Also, the Voutour shooting was not the only shooting incident involving the Saugus police department. There were three shooting incidents on the 1 a.m. to 9 a.m. division in the eleven months prior to the Voutour shooting.

The Petitioners claim that no evidence was adduced that any officer other than Vitale was improperly trained. Petition at 22. The documents submitted by the Petitioners in support of their motion for summary judgment did

not foreclose the possibility that other police officers were not sent to police training school at all or were not sent until some time after the time required. This Court should not decide such factual disputes.

Further evidence that there is no conflict between the decisions in *Tuttle* and *Voutour* is that the Court of Appeals in *Voutour* expressly acknowledged that an isolated incident of excess force could not form the predicate for the customary use of excess force by the police department. *Voutour,* 761 F.2d at 820 n.5. Thus, the *Voutour* decision is in agreement with the *Tuttle* decision on this very issue.

Even if the evidence established that Vitale was the only police officer improperly trained, the Town could still be liable under § 1983. The municipal custom was to inadequately train Vitale and to send him out on patrol knowing that he had not received the required training. Unlike the *Tuttle* case, in *Voutour* there is direct evidence as to the Town's customs and policies with regard to the police officer involved in the unconstitutional conduct. For example, an individual's constitutional rights are still violated whether a Town has a custom or policy of allowing its entire police force to use excess force or its custom or policy is to allow one particular police officer to use excess force. The Town would have a municipal policy or custom as to that one officer. All the *Tuttle* decision requires is that a plaintiff show more than one incident to show the policy existed. In this case, even if the Petitioners adequately trained all of the other police officers on the force, they did not adequately train Vitale in accordance with state law. Each day that Vitale was sent out on duty without having been to training school was a

separate incident evidencing a municipal policy or custom for which the Town can be held liable under 42 U.S.C. § 1983.

V. The Court Of Appeals Analysis Of Qualified Immunity Did Not Depart From The Supreme Court Decision In Harlow v. Fitzgerald.

The Court of Appeals in addressing Chief Forni's claim of qualified immunity analyzed whether he was entitled to summary judgment based on qualified immunity under the standard set forth in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). *Voutour* at 818-819, 822 n.7. The *Harlow* Court observed that qualified immunity was an attempt to balance competing values of a damages remedy to protect the rights of citizens with the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official activity. *Harlow* at 807. The *Harlow* standard for qualified immunity is that "government officials performing *discretionary* functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (emphasis supplied).

During the period that Vitale was a regular police officer, Chief Forni could be expected to know that excessive force by means of a shooting would violate a person's constitutional right provided by the fourteenth amendment not to be deprived of liberty without due process. As the Court of Appeals stated, Chief Forni could be expected to know that his failure to have Vitale attend training school and receive training as to when to

shoot and when not to shoot would give rise to a shooting that would violate a person's constitutional rights. *Voutour,* 761 F.2d at 822 n.7. The constitutional repercussions of Forni's conduct was sufficiently foreseeable that a reasonable person would have known that such conduct violated clearly established statutory and constitutional rights under the standard set forth by the *Harlow* Court.

Also, Chief Forni could not be entitled to qualified immunity under the *Harlow* standard because qualified immunity only applied to the performance of discretionary functions. *See Harlow* at 818. State law required that full time regular police officers be sent to police training school within nine months. See G.L. c. 41, § 96B. This state law was mandatory and Chief Forni acted in violation of the state law by failing to send Vitale to police training school as required. Thus, Forni was not vested with discretion in this situation and, therefore, is not entitled to qualified immunity.

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CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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